JD–37–04
Toledo, OH

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

SERVICE SPRING CORP.,

and Case No. 8–CA–33022

ANTHONY DURCO, AN INDIVIDUAL

Nancy Recko, Esq.,
for the General Counsel
Jeffery Perkins, Esq., and Charles Boxell, Esq.,
of Toledo, Ohio, for the Respondent
Anthony R. Durco, of Oregon, Ohio,
for the Charging Party

DECISION

Statement of the Case

Eric M. Fine, Administrative Law Judge. This case was tried in Toledo, Ohio, on February 3 to 6, 2003. The charge, first amended charge, and second amended charge were filed on December 31, 2001, February 22, 2002, and August 14, 2002, respectively, by Anthony Durco, an individual, against Service Spring Corp. (Respondent). Complaint issued on August 28, 2002, alleging Respondent violated Section 8(a)(1) of the Act by: creating the impression of surveillance of an employee's union activity; promulgating an overly broad no solicitation rule by informing an employee he should not discuss the union on company time; interrogating employees about their union activity and the activity of others; and soliciting grievances from employees. The complaint alleges Respondent violated Section 8(a)(1) and (3) of the Act by on September 7, 2001, issuing a verbal warning to employee James Holl, and by on December 7, 2001, discharging employees Anthony Durco, Gary Reens, James Holl, Altino Griffin, Robert Ramirez, Bryan Short, and Tim Anderson because of their union and concerted activities.

By separate motions filed on January 30, 2004, and March 19, 2004, counsel for the General Counsel sought my approval of the partial withdrawal of the charge and partial dismissal of the complaint as it related to the terminations of alleged discriminatees Durco, Reens, Griffin, Ramirez, and Short based on separate non-Board settlements entered into between Respondent and each of these individuals. Counsel for the General Counsel represented in her motions that the non-Board settlements effectuated the policies of the Act. Based on those representations, as well as a review of the attached settlement agreements, in separate Orders dated February 2, 2004, and March 22, 2002, I granted the General Counsel's motions and the charging party's partial withdrawal requests and dismissed those portions of the complaint relating to December 7, 2001, terminations of Durco, Reens, Short, Griffin, and Ramirez.[1] In doing so, I reserved the right to consider all record testimony and evidence to

[1] In this regard, all parties agreed to be bound to the settlements, and the General Counsel
Continued

resolve the remaining issues, including the December 7, 2001, terminations of Anderson and Holl. Thus, while in the body of this decision I have found Respondent's December 7, 2001, permanent layoff of all of the alleged discriminatees listed in the complaint to be motivated by anti union animus, I have only made unfair labor practice findings and issued recommended remedies for alleged discriminatees Anderson and Holl.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

Findings of Fact[2]

I. Jurisdiction

Respondent, a corporation, is engaged in the manufacture of spring coils at its facility in Millbury, Ohio, where it annually sells and ships goods valued in excess of $50,000 directly to points outside the state of Ohio. Respondent admits and I find it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO (the Teamsters) and the United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) are labor organizations within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

Michael McAlear, at the time of the trial, had been Respondent's president for about 9 years.[3] Seven individuals report to McAlear. They are: Craig Radabaugh, vice president of sales and marketing; Brian Knoblauch, vice president of information services; Tim Szymanski, vice president of purchasing; Joe Matthews, vice president of operations and plant manager; Ursula Zankl, vice president of financial services and human resources; Lori Herman, accounting manager; and Steve Henry, controller.[4]

Matthews was hired on July 26, 2000, and is responsible for the plant operations. Ken Stapleton, who reports to Matthews, was hired as production and shipping manager on March 5, 2001. Dan Susor is Respondent's safety and cable manager and he also reports to Matthews.

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has recommended they be approved. I also find the settlements were reasonable in terms of risks inherent in the litigation. See *Independent Stave,* 287 NLRB 740, 743 (1987). I have entered my February 2, 2004, and March 22, 2002, Orders, counsel for the General Counsel's motions, the attached settlement agreements, and the partial withdrawal requests in evidence as Administrative Law Judge Exhibits 1 and 2.

[2] In making these findings, I have considered the demeanor of all witnesses, the content of their testimony, and the inherent probabilities of the record as a whole. In certain instances, I have credited some but not all of what a witness said. See *NLRB v. Universal Camera Corporation,* 179 F. 2d 749, 754 (C.A. 2), reversed on other grounds 340 U.S. 474 (1951).

[3] Michael McAlear was the only individual named McAlear to testify and will be referred to as McAlear.

[4] Respondent admits in its answer to the complaint that McAlear, Radabaugh, Knoblauch, Szymanski, Matthews, Zankl, Herman, CEO Pat McAlear, Chief Financial Officer Marilyn McAlear, Plant Superintendent Jeff Reau, Manager of Shipping and Production Kevin Stapleton, and Crew Leader Joseph Gillespie are its supervisors and agents within the meaning of Section 2(11) and 2(13) of the Act.

A. The supervisory and/or agency status of
crew leaders Tim Anderson and Joe Gillespie

The General Counsel alleges crew leader Joe Gillespie is a statutory supervisor and agent and that he unlawfully interrogated employees about their union activities on December 5, 2001, just 2 days before Respondent permanently laid off the alleged discriminatees. However, the General Counsel also contends alleged discriminatee Tim Anderson is a statutory employee, although Anderson was a crew leader at the time of his December 7. 2001, termination. Respondent admits Gillespie is a statutory supervisor and agent and it contends that Anderson as well as all of its crew leaders are statutory supervisors.

The crew leaders were stipulated out of the bargaining unit, which voted in an election for union representation taking place in October 2000. Respondent employed a complement of about six crew leaders in 2001. McAlear testified that all crew leaders receive an extra $2.50 an hour over their regular hourly rate.[5] All of Respondent's hourly and salaried employees receive the same benefit package. The size of the crew leaders' crews varies. Gillespie is the crew leader in the mandrel area. Gillespie had five or six employees with six machines under him in 2001. Anderson was the crew leader in roll forming; he had two employees plus a floater with two machines under him in 2001.

Matthews testified the crew leaders reported directly to him during the period of January to March or April 2001, because Respondent did not have a production manager. After Stapleton was hired, crew leaders Morrin, Carpenter, and Hester reported to Stapleton. However, Matthews testified that, in December 2001, Matthews was keeping an eye on production, so crew leaders Gillespie and Nagley reported directly to Matthews. Matthews testified Anderson reported to Susor at the time of Anderson's December 7, 2001, termination. Crew leader Deleon reported to then supervisor Sean Vincent.

At the time of his December 2001 termination, Anderson had held the roll forming crew leader position for about 5 years. In December 2001, the other permanent employees in roll forming were Marlon Wharton and Charles Brown. Employee Tom Ramirez floated between departments, including roll forming. Wharton and Brown each worked in roll forming for about 2 years. Anderson denied supervising Wharton or Brown testifying they worked as a team and Wharton was the assistant crew leader.

Anderson's credited testimony reveals that: Anderson attended crew leader meetings, which changed from monthly to weekly around late summer 2001. Stapleton conducted the meetings, which were attended the by the crew leaders, as well as Reau, Susor, and sometimes Matthews. Wharton attended crew leader meetings when Anderson was absent. Discussions at the meetings included spring production, and safety issues. During the 2000 union campaign, Anderson attended crew leader meetings conducted by outside consultant Walt Fitzhenry where the union campaign was discussed. Anderson also attended four crew leader meetings Fitzhenry ran every Monday in August 2001. Union organizing as well as other topics were discussed at these meetings, which were attended by members of management, including: McAlear and Matthews. Marilyn McAlear attended a few of these meetings.

Zankl testified she was involved in the discipline of employees at the suspension level, but not necessarily for write-ups. Zankl testified crew leaders can write an employee up, but it is

[5] The amount of extra hourly pay for crew leaders, although apparently uniform, has changed over time.

usually discussed with someone in higher management before the write up is issued. Zankl initiates attendance related discipline because she keeps track of attendance through pay roll, although a crew leader may sign off on attendance related discipline. Matthews testified he oversees the discipline of plant employees. He consults with the production manager, the cable manager, sometimes with crew leaders whether discipline may be appropriate. Depending on the severity of the infraction, Matthews signs off on disciplinary paper work. If a crew leader has an issue, they would go to Stapleton, and Matthews may review it. But the two signatures on the disciplinary form would be the crew leader and Stapleton's. If the disciplinary situation dealt with Stapleton and the crew leader is not involved, Matthews and Stapleton would sign the discipline. In 2001, Matthews had a role in determining whether an employee should be discharged. He reviewed the facts with the members of management, and they would often seek legal counsel before making a decision.

Matthews testified in the event there was a disciplinary issue or a safety violation; it was Anderson's responsibility to report it to the next level of supervision. Zankl testified she doubted Anderson disciplined anyone because the employees working under him did not need to be disciplined. Anderson testified he did not issue warnings to Brown or Wharton, or recommend they be written up. Anderson testified he did not have authority to send an employee home, and did not have access to employee files. Anderson testified he had no role in the hiring process and he could not fire employees.

Anderson's credited testimony reveals the following: There are two machines used in roll forming, one was set up to run curved slats and the other machine was set up to run flat slats. Anderson usually ran the curved slat machine and Wharton primarily ran the flat slat machine. They occasionally alternated between machines for a change of pace. Brown worked as an assembler. When they needed extra help, Anderson asked Susor for assistance and Susor would find someone. On occasion, Wharton was the one who asked Susor for assistance. Anderson could not take an employee off another line to work in roll forming without Susor's permission. If a temporary employee worked in roll forming on assembly, Brown showed them what to do. Temporary employees did not run the machines. The jobs ran in roll forming by the date of the work orders, with the oldest first. The work order called for flat slats or curved slats, which determined the machine it ran on. Employees from sales would sometimes request that a small order go out before a previously dated order, or request a special date for an order to be shipped. Anderson operated a machine 8 hours a day.[6] As crew leader, Anderson was required to make sure people were working, but his crew was well trained. When employees called in sick everyone in the plant called a specific number where Gillespie answered the phone.[7] Anderson could not grant vacation requests. The employees gave vacation request forms to Susor. Anderson could not allow an employee to leave early without informing Susor.

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[6] Zankl and Matthews testified in a somewhat conclusionary fashion as to the manner in which assignments were made and the work was performed in roll forming. To the extent their testimony differed from Anderson's description, I have credited Anderson considering his demeanor and his greater familiarity with the way department was run. I do not credit Matthews' testimony that Anderson could have assigned his crew members to another crew, upon consultation with another crew leader. Rather, I have credited Anderson's testimony that any such reassignment could only be done if Anderson first consulted with Susor, who was Anderson's supervisor.

[7] I am aware that Respondent's call in procedure in its employee handbook states employees should "contact your lead person or a supervisor…". However, notwithstanding the manual, I have credited Anderson's testimony, which is undisputed, that the practice for day shift employees was to call Gillespie.

Anderson did not fill in for Susor when he was out. The crew leader does not have any role in Respondent's grievance procedure.

Matthews testified to the following: When Matthews arrived at Respondent, the crew leaders wrote written evaluations for employees, and the employees' wage increases were tied to their evaluation ratings. In Matthews view, the crew leaders over rated the employees' performance to allow them to receive the maximum wage increase. While Matthews signed off on the evaluations in February 2001, Matthews did not necessarily concur with the reviews. Rather, he signed off to complete the process. Shortly after Stapleton was hired in March 2001, Respondent separated employee wage increases from their reviews, and employees received raises automatically regardless of how they were rated. At that time, while in Matthew's view the crew leaders still tended to overrate employees, the evaluations began to change to more accurately reflect performance. Anderson also testified that sometime after Matthews arrived at the plant; raises were granted automatically without reference to the employees' evaluations.[8]

1. Analysis

The burden of proving an individual is a statutory supervisor rests with the party asserting it. See, *NLRB v. Kentucky River Community Care,* 121 S.Ct. 1861(2001). Section 2(11) of the Act defines "supervisor" as

> any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

In *NLRB v. Kentucky River Community Care*, supra at 1867, the Court stated Section 2(11) of the Act:

> …sets forth a three-part test for determining supervisory status. Employees are statutory supervisors if (1) they hold the authority to engage in any 1 of the 12 listed supervisory functions, (2) their 'exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment,' and (3) their authority is held 'In the interest of the employer.' *NLRB v. Health Care & Retirement Corp. of America,* 511 U.S. 571, 574, 114 S.Ct. 1778, 128 L.Ed.2d 586 (1994).

I have concluded that Respondent has failed to meet its burden of establishing that Anderson was a statutory supervisor. Anderson reported to Susor, who reported to Matthews. Anderson's crew consisted of himself, two other employees, and an occasional floater. Anderson operated one of the two machines in his department and he performed hands on work 8 hours a day. Wharton operated the other machine, although they occasionally alternated machines to prevent tedium. One machine was set up to run curved slats, and the other to run flat slats. Machine operation depended on work order requirements, which ran by the oldest date first, unless Anderson received a request by a salesman to complete an order out of turn. Brown was not skilled in operating either machine and performed assembly work. Brown

[8] Anderson filled out evaluation forms for Wharton and Brown. While Anderson testified Susor made changes to the evaluations after Anderson filled them out, a review of several evaluations for Wharton and Brown disclosed Susor made few changes.

showed temporary employees assigned to the area what to do in assembly, as the temporary employees generally did not operate a machine. Anderson's crew did not report off sick to Anderson, and he could not approve leave requests. Anderson could not take an employee off another line without obtaining Susor's permission. I find the work in the roll forming department was repetitive and Anderson's authority to assign employees was routine in nature, bounded by work orders, and instructions by Anderson's supervisors.[9]

Anderson's testimony is undisputed that he never disciplined an employee. There is testimony that crew leaders role in the disciplinary process was to report incidents to Stapleton or Matthews. Assuming that making reports of work incidents was part of Anderson's responsibility as a crew leader, there is no showing Anderson had the authority to exercise independent judgement in determining or effectively recommending discipline, as opposed to merely reporting events, which were then independently investigated.[10] While I have concluded Anderson authored employee evaluations, Matthews testified that shortly after Stapleton was hired in March 2001, the evaluations were no longer relied on to establish wage increases. Thus, as of December 2001, the time of Anderson's termination, Anderson had no ability to reward employees, and Respondent's officials testified the employees' evaluations were not considered in deciding which employees were to be terminated on December 7, 2001. The Board has held "when an evaluation does not, by itself, affect the wages and/or job status of the employee being evaluated, the individual performing such an evaluation, will not be found to be a statutory supervisor." See, *Elmhurst Extended Care Facilities,* 329 NLRB 535, 536 (1999); and *Ten Broeck Commons,* 320 NLRB 806, 813 (1996).

I do not find Anderson's attendance at crew leader meetings, or the higher hourly rate crew leaders receive sufficient to elevate Anderson to supervisory status. The Board has held that secondary indicia alone are insufficient to establish supervisory status. See *General Security Services Corp.,* 326 NLRB 312, 312 (1998) enfd. 187 F. 3d 629 (8th Cir. 1999); and *Chrome Deposit Corp.,* 323 NLRB 961, 963, fn. 9 (1997).

The General Counsel alleges, and Respondent admits in its answer, that Gillespie is a supervisor and Respondent's agent within the meaning of Section 2(11) and 2(13) of the Act. The Board has held the General Counsel is entitled to rely on such an admission in the pleadings, which takes the issue out of play during litigation. See *Boydston Electric,* 331 NLRB 1450, 1451 (2000); and *Liberty Natural Products,* 314 NLRB 630 (1994), enfd. mem. 73 F. 3d 369 (9th Cir. 1995), cert. Denied 518 U.S. 1007 (1996).

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[9] See, *Intl. Assn. of Bridge, Etc., Loc. Un. No. 28,* 219 NLRB 957, 961 (1975), where a group of working foremen and a general foreman were found not to be statutory supervisors when they acted "within a very limited sphere in giving instructions to employees, bounded by the blueprints and instructions from the contractor or his supervisor." Their authority was found to be routine not requiring the use of independent judgment. See also *Electrical Workers IBEW Local 3 (Cablevision),* 312 NLRB 487, 488-489 (1993) (Monopoli); *George C. Foss Co.,* 270 NLRB 232, 234-235 (1984) (Merrow), enfd. 752 F.2d 1407 (9th Cir., 1985); and *Ogden Allied Maintenance Corp.,* 306 NLRB 545, 546 (1992) (Michot), enfd. 998 F.2d 1004 (3rd Cir. 1993).

[10] *See Clock Electric Inc.,* 338 NLRB No. 110, JD. at 21 (2003), where PPM Sevchek was found not to be a supervisor, although if there was a problem PPM's could send an employee back to the shop for the matter to be investigated, and where Sevchek would record incidents with employees in his foreman's logs and turn them into the shop.

In the instant case, Gillespie and Anderson retained the title of crew leader, and I have concluded Anderson was not a statutory supervisor. Despite their having the same title, the record disclosed differences in their responsibilities. Gillespie's crew consisted of five or six employees, in addition to himself, while Anderson only had two employees on his crew. Gillespie was the crew leader in the mandrel area with six machines in his department, while Anderson only had two. Matthews testified Gillespie was in charge of a production area, as a result in December 2001 Gillespie reported directly to Matthews, whereas most of the other crew leaders reported to either Stapleton, or another management official such as Susor, who in turn reported to Matthews. Moreover, as Anderson credibly testified when the hourly employees called in sick, including employees on Anderson's crew, they called Gillespie for approval. Thus, Respondent placed Gillespie in a position of greater responsibility than most of its other crew leaders. Moreover, regardless of Gillespie's supervisory status the record established, as Respondent admitted, that he was an agent of Respondent within the meaning of Section 2(13) of the Act. In this regard, Gillespie reported directly to Matthews, was in charge of a significant number of employees in a critical area of the plant, evaluated employees, gave them instructions, could sign off on certain discipline, and was designated as Respondent's plant wide representative for employees calling in sick. As such, Respondent placed Gillespie in a position where employees could reasonably believe he spoke on behalf of management. *U.S. Service Industries,* 319 NLRB 231, fn. 2 (1995), enfd. 107 F.3d 923 (D.C. Cir. 1997).

B. The Union Campaigns and the events leading to the December 7, 2001, permanent layoffs

Teamsters Local 20 filed a petition for election on September 18, 2000, seeking to represent certain of Respondent's employees. Following a stipulated election agreement, an election was held on October 26, 2000, in a bargaining unit that excluded crew leaders. During the election 48 votes were cast, 24 for and 22 against the union, with 2 challenged ballots. A hearing was conducted on challenged ballots on December 1, 2000. It was determined through the hearing and appeals process to the Board that the two challenged ballots should be opened and counted, and a revised tally of ballots issued on April 13, 2001, showing 24 votes for and 24 votes against the union thereby defeating the union's election bid. A certification of results issued on May 7, 2001.

At the time of their December 7, 2001, permanent layoff, Durco, Reens, and Griffin worked in middle UPS, Ramirez worked in new operations, Anderson worked in roll forming, Holl worked as a mandrel operator, and Short worked on the second shift in the automatics department. Aside from Short, all of the other named employees worked on the first shift.

Durco became involved in the Teamsters Local 20 campaign in September 2000.[11] Durco was the chief organizer. Durco spoke with employees in favor of union representation, and provided employees with Teamsters shirts, hats, and buttons. Durco was the union

[11] The findings set forth above concerning Durco, Reens, Short, Griffin, Ramirez, Holl, and Anderson's union activity and their encounters with management concerning that activity are drawn from their credited testimony. Considering their demeanor, they testified about these events in a straightforward and credible fashion, and most of the incidents described went undenied by Respondent's officials. The employees' specific testimony, unless otherwise specified, was only met by general denials of knowledge by Matthews of union activity of all the employees except for Durco and Short. For reasons set forth below, I did not find Matthews' testimony worthy of belief.

observer at the October 26, 2000, election, and he attended the December 2000 hearing on challenges.

In September 2000, Marilyn McAlear approached Durco in the shipping department and asked Durco why he was doing this.[12] Durco responded it was a business decision and he felt a majority of employees wanted union representation. Marilyn McAlear told Durco he could have any job in the place, he just had to ask and she showed Durco a piece of paper, which broke down the cost of insurance, along with the employees' wages. Durco told Marilyn McAlear wages were not a concern; it was the way people were being discriminated against and treated. Marilyn McAlear said she had not slept in a week and was going to have a heart attack over this. Marilyn McAlear said she did not want the Teamsters because they were a bunch of gangsters, and "we don't want the Union in here telling us what to do." Marilyn McAlear raised her voice and asked Durco if he knew who Jimmy Hoffa was. Durco said yes, and Marilyn McAlear said, "well you're going to end up in the same place he is." Then Susor came up and walked Marilyn McAlear outside. I find this conduct, although occurring outside of the Section 10(b) period of the charge, constituted a coercive interrogation of Durco concerning his union activity, an implied promise of a better job if Durco ceased his union activity, and an implied threat of bodily harm when Durco refused to accede to Marilyn McAlear's request. The Board has repeatedly held that statements or conduct outside the 6 month limitations period under Section 10(b) of the Act for a finding of a violation can be considered as background evidence of animus towards union activity. See *Campbell Electric Co.,* 340 NLRB No. 93, JD slip op. at 7, fn. 9; *Wilmington Fabricator, Inc.,* 332 NLRB 57, 60 fn. 6 (2000); *Kaumograph Corp.,* 316 NLRB 793, 794 (1995); and *Douglas Aircraft Co.,* 307 NLRB 536, fn. 2 (1992). enfd. 66 F. 3d 336 (9th Cir. 1995).

A couple of days later in the shipping department, Matthews asked Durco to give him a chance to prove himself and for Durco to call off the union election. Matthews said the workers respected Durco and Durco could lead them away from the election. Durco declined Matthews' request. Durco attempted to return to his work bench, but Matthews kept stepping in front of him blocking his return while repeatedly asking Durco to reconsider stating "we don't need a union in here…". Durco kept denying Matthews' request, until Durco ended the conversation stating he had work to do. The Board has held its is permissible campaign propaganda for an employer official to make generalized requests for more time, or a second chance during a union campaign, as long as they do not make any specific promise that any particular matter would be improved. See *Noah's New York Bagels,* 324 NLRB 266, 267 (1997). However, I find Matthews crossed the line here and that his conduct towards Durco was coercive particularly when it occurred so close in time to Marilyn McAlear's coercive questioning of Durco. In this regard, Matthews approached Durco as a leader of the union movement and singled him out in an attempt to pressure him to short circuit the election process. Matthews would not take no for an answer. Rather, he repeatedly blocked Durco's return to work in order to pressure him into using his influence on other employees to terminate the election process.

Reens learned employees were trying to organize a union in 2000 through conversations with Durco. Reens wore a Teamsters shirt and pins to work and spoke to employees about the union. Some time before the October 2000 election, Matthews came to where Reens was working and asked him to stop the union activity to give Matthews and the company 6 months to show what we can do for you. Matthews asked Reens to stop the vote and said that the union was not good for them. Reens responded they needed the union for job security and protection.

[12] Marilyn McAlear did not testify.

Reens also had a conversation with Radabaugh at Reens' workstation.[13] Radabaugh listed the reasons they did not need a union, and he asked Reens to give them a chance to straighten things out and show Reens what they could do for him. Radabaugh said Reens had some input, and asked him to try and stop the union vote. Here again, although outside the Section 10(b) period, I find Respondent's conduct towards Reens was coercive in that it went beyond speeches to groups of employees making generalized requests for more time that the Board has allowed as legitimate electioneering. Rather, Respondent's upper level management Matthews and Radabaugh targeted Reens, who they perceived as a leader of the union movement, and attempted to pressure him to short circuit the election process by implied promises of benefits. I find Respondent's conduct here was coercive constituting background evidence of animus.

Ramirez and Griffin learned of the Teamsters' campaign in September 2000, from Durco. During this time period, Ramirez wore a Teamsters shirt and Griffin wore pro-union buttons to work. Short wore Teamsters shirts and pins to work on numerous occasions. The Teamsters subpoenaed Short to attend the December 2000 hearing on challenged ballots. Short showed Matthews the subpoena, and attended the hearing. Holl signed a union card and talked to a number of workers about the benefits of being in the union.

Anderson attended crew leader meetings during the 2000 Teamsters campaign. Anderson relayed information to Durco about what transpired during those meetings concerning the union. Anderson also spoke to employees in favor of the Teamsters. When Anderson learned that, as a crew leader, he could not vote in the union election, Anderson asked Radabaugh if McAlear would let Anderson keep his job if Anderson resigned the crew leader position. Radabaugh said he did not think so. Anderson did not tell Radabaugh why he wanted to step down.

Shortly after the May 7, 2001, certification of the election results, Griffin complained to Matthews about writing on the restroom wall listing six names, including that of Griffin, Durco, Reens, and Holl with the statement that all union supporters should be fired. Matthews said he would take care of it, and the writing was removed.

After the certification of the election results, Matthews called Short into his office. Matthews told Short he was calling everyone in to get a wish list of what they wanted changed at Respondent. Matthews said first he wanted to know how Short voted. Short said he did not think Matthews could ask that. Matthews said they were playing under different rules since the election was over. Short said Matthews already knew how he voted since Short wore it on his shirt. Short said he thought they needed a union because employees needed a voice, and it was like having a lawyer. Short told Matthews he wanted to have a say in his future and did not want to place all of his trust in one person's hands. Similarly, Reens was called into Matthews' office during this time period. No one else was present except Reens and Matthews. Matthews said he wanted to ask Reens a few questions. Matthews said, "Off the record, I know how your feelings work towards the Union. I know you're a big Union supporter. You signed the Union card?" Reens responded yes. Matthews asked Reens what he thought would make the company better, and Reens said wages, benefits, and more vacation, but he knew they could not have it all. I find that Matthews questioning Reens about whether he signed a union card, and Short about how he voted following the union election, although outside the Section 10(b) period, constituted coercive interrogations and evidence of animus. While Reens and Short were open union supporters during the election campaign, Matthews post-election questioning

[13] Radabaugh did not testify.

served no purpose, except to impress on the employees that the Respondent was keenly aware of their pre-election conduct. Moreover, the employees were given no assurances that there would be no retribution for their response. See *Upland Freight Lines, Inc.,* 209 NLRB 165, 172 (1974). Particularly, with respect to Short, Matthews attempted to pierce the sanctity of the Board's secret ballot election by asking Short how he voted over Short's protest. I also find that Matthews coercively solicited grievances from Short and Reens during these meetings.[14] Matthews' questions about Reens and Short's union activity during these meetings, could only send a signal that he was soliciting their grievances, with the implied promise to remedy them in order to prevent a repeat of such activity.

Respondent instituted a wage leveling increase for its hourly employees in May 2001 in which an employee's wage rate was increased to reflect his or her seniority. Matthews testified the wage increase was part of a plan to separate wage increases from employee reviews. McAlear agreed with Matthews' suggestion to make all of the employees whole for any prior raises they had lost as a result of past reviews. Matthews testified there was a need to take this action because he received complaints from employees questioning how they were going to recoup lost raises.[15]

Durco authored a typewritten letter dated July 25, 2001, to McAlear. The letter did not mention Durco by name. Rather, it was signed Service Spring Employees. Durco gave it to employee Roger Ford, who delivered it to Respondent's office. The letter states that, "The majority of Employees are concerned what will happen, since business is slow and the economy is down." The letter goes on to state that a union has been contacted, but before the employees sign cards, they propose a binding contract with Respondent that the employees would not be terminated "for unjust causes." It asked for Respondent to "take a look at the Middle and Upper Management, to see if they're truly the best suited for their positions." The letter ends by stating, "Please get in contact with us before the dead line, or we will have no other choice but to sign Union Cards and have another Union Election. Hopefully we can meet on some terms." Around a week after Ford delivered the letter to the office, Matthews conducted small group meetings with employees. In the meeting Durco attended, Matthews showed the letter to the employees, and stated he wanted to assure employees they had job security, and that if a layoff occurred it would be by seniority.

Anderson's credited testimony reveals that in August 2001, Respondent ran a series of crew leader meetings conducted by the outside consultant Respondent employed during the 2000 Teamsters campaign. Union organizing was discussed during the August 2001 meetings, which were also attended by members of management. Anderson's testimony is undenied that McAlear said at one of the meetings that there was talk about a union organizing campaign throughout the plant. McAlear said the employees would probably want to organize after they found out they would not get a Christmas bonus in December 2001.[16]

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[14] While Respondent has a grievance procedure in its employee manual for employees to initiate complaints, there was no contention here that until the employees' union activity that Matthews had a practice of calling employees in on an individual basis to solicit their suggestions. See *Clark Distribution Systems,* 336 NLRB 747, 748 (2001).

[15] Zankl testified Respondent implemented this extra increase despite her and McAlear's concern at the end of February 2001, that direct labor costs were becoming too high of a percentage of cost of goods sold. Zankl testified the components of cost of goods sold are direct labor costs and cost of material.

[16] Matthews testified Respondent brought outside consultant Walt Fitzhenry in for training in 2001. Matthews estimated that there were eight chapters discussed at these meetings, one of

Continued

Anderson again became involved in the employees effort to organize a union in September 2001, by talking to Durco about relaying information and talking to employees. Anderson's credited and uncontradicted testimony reveals that in late September 2001, Anderson asked Matthews if a crew leader could step down and keep his job. Matthews said, at his prior employer, a lead man could not step down and keep his job.

1. Stapleton's September 26 warning to Holl that he could not solicit for the union on company time.

Holl learned employees were attempting to organize for the Teamsters in the Fall of 2001. Holl signed a Teamsters card at that time, and Holl talked to other employees about the benefits of being in a union. Holl credibly testified that: On September 26, 2001, Holl met with Stapleton and Holl's crew leader Gillespie in Stapleton's office. Stapleton told Holl that Holl was being monitored for being in the restroom for 20 minutes. Stapleton told Holl that he was being closely watched. Stapleton told Holl if you want to talk union, talk union on your time and not company time. Holl did not say anything in response.[17] During the meeting, they also discussed Holl's annual appraisal, and Holl signed off on the evaluation, with a signature date of September 26, 2001.

Holl's personnel file contains a written verbal warning report dated September 7, 2001. The warning signed by Stapleton is for a violation of company rules. It reads, "I had a talk with Jim about not using company time to discuss union activities. Jim would follow people into the restroom to get support for a union. He was told he could do this only on breaks and lunch and to make sure that whomever he talks to is also on break." Holl testified he was never shown the warning, and the place for employee signature is blank. Holl also credibly testified that the one and only conversation he had with Stapleton about talking about the union in the restroom took place on September 26, 2001.

Stapleton testified Gillespie told Stapleton that Gillespie had received reports from employees that Holl was following people into the restroom and harassing them about the union. As a result Holl was written up for leaving his workstation during work time. Stapleton testified when he called Holl in and asked him about it, Holl did not deny it. Stapleton testified he told Holl to feel free to take his lunches and breaks and do what he needs to do. He testified he was concerned about Holl leaving his workstation because he had a production schedule and he needed Holl to work when he was supposed to work. Stapleton testified he had never received instructions about Respondent's solicitation policy and that he was not given instructions about what the employees were able to do concerning the union. He testified the union was never discussed with him. Stapleton testified he was aware employees could

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which involved proper and improper conduct regarding a union campaign.

[17] Holl credibly testified he was in the restroom for about 10 minutes. However, he testified he was not talking about the union. Rather, he testified two employees approached him and they were talking about a conflict between Holl's son who worked for Respondent and second shift supervisor Dwayne Deleon, which had nothing to do with the union. There is no contention that Holl ever informed Stapleton that Holl was not talking about the union. Holl admitted the conversation with the two employees did not take place during his break period. I have credited Holl's testimony that he was not discussing the union at the time of this conversation, despite his failure to report this to Stapleton. In this regard, I find it likely that Holl did not want to report a potential dispute with Holl's son and the second shift supervisor to Stapleton.

discuss the union during their breaks because Stapleton had been a union member during prior employment.

Considering his demeanor, I did not find Stapleton's testimony to be very convincing. First, Stapleton failed to explain why Holl was not shown and did not sign the September 7 warning contained in Holl's file. Stapleton also failed to refute Holl's testimony that Stapleton approached Holl about this conduct on September 26 not September 7, the date written on the warning rendering the contents of the warning as suspect.

Stapleton was hired as the production and shipping manager, a relatively high level position at Respondent's facility in March 2001, following a close and hotly contested election taking place on October 26, 2000, that was not finally decided until certification of results issued in May 2001. Thus, Stapleton's claim that the union was never discussed with him and he received no instructions on Respondent's solicitation policy did not have a ring of truth. Moreover, Stapleton's testimony was undercut by that of Matthews. In this regard, Matthews testified Respondent held a training session in 2001 attended by all members of the management staff reporting to Matthews. Anderson testified this training took place in August 2001. Matthews testified one chapter of the training involved proper and improper activity concerning a union campaign. Moreover, while Stapleton contended he never received instructions concerning Respondent's solicitation policy, the parties stipulated into evidence Respondent's "Employee Handbook," dated March 1, 2001 as a joint exhibit.[18] The handbook contains the following rule:

> SOLICITATION
> Service Spring does not permit outside vendors to solicit on company premises. Employees are permitted to solicit such things as Girl Scout cookies or school fund raising sales as long as they solicit employees while they are on their break or lunch time, in non work areas and have prior authorization from the Human Resource Department or plant management.

Respondent also maintains the following rule in its March 1, 2001, employee handbook under discipline, "Personal business may not be conducted during working hours."

Respondent argues in its brief that, "Service Spring is allowed to promulgate a rule prohibiting Union solicitation on company time." (Resp. Brief at 14). Respondent also asserts that Stapleton's informing Holl that he was being monitored after Stapleton reprimanded Holl for being in the bathroom for 20 minutes and for talking about the union on company time is not unlawful. It is asserted rather, Holl received a verbal warning on September 26, 2001, for abusive bathroom use during working time. It is further asserted that Holl was free to discuss the union when he was not working and in non work areas. (Resp. Brief at 15-17).

[18] Short, Anderson, Ramirez, Reens, Holl, and Durco's personnel files reflect they signed for receipt of the March 1, 2001, handbook on either March 6 or 7, 2001. I find it extremely unlikely that Stapleton, as a member of management, was not provided with and required to read Respondent's employee handbook. Moreover, Matthews testified he thought he instructed Stapleton to talk to Holl about leaving his workstation, and Matthews thought Stapleton disciplined Holl for walking off the job in 2001. Holl's file only contains the September 7, 2001, verbal warning which relates to his being away from his workstation.

a. Analysis

The Board regards rules prohibiting solicitation during "working hours" to be presumptively unlawful because this term connotes “periods that include the employees’ own time,” whereas rules prohibiting solicitation during "working time" are presumptively valid “because such rules imply that solicitation is permitted during nonworking time, a term that refers to the employees’ own time.” See *Our Way,* 268 NLRB 394, 394-395 (1983).[19] The Board has held rules that preclude solicitation or talking about the Union on “company time” are presumptively unlawful as they can be “reasonably construed as encompassing both working and nonworking time…”. See *Litton Systems,* 300 NLRB 324, 324 (1990), enfd. 949 F.2d 249 (8th Cir. 1991), cert. denied 503 U.S. 985 (1992); *Kenmore Mercy Hospital,* 319 NLRB 345, 346; (1995).

In *Jensen Enterprises, Inc.,* 339 NLRB No. 105, slip op. at 3-4 (2003), the Board stated:

> It is settled law that an employer may forbid employees from talking about a union during periods when the employees are supposed to be actively working, if that prohibition also extends to other subjects not associated or connected with their work tasks. However, an employer violates the Act when employees are forbidden to discuss unionization, but are free to discuss other subjects unrelated to work, particularly when the prohibition is announced or enforced only in response to specific union activity in an organizational campaign. *Willamette Industries,* 306 NLRB 1010, 1017 (1992); *Orval Kent Food Co.,* 278 NLRB 402, 407 (1986).

The disciplining of employees for union activities pursuant to an unlawful no solicitation or no distribution rule is violative of Section 8(a)(1) and (3) of the Act. See *Laidlaw Transit, Inc.,* 315 NLRB 79, 83; and *Switchcraft Inc.,* 241 NLRB 985, 985-986 (1979), enfd. 631 F.2d 734 (7th Cir. 1980). The Board also finds no solicitation rules that forbid oral solicitations, as opposed to distributions, in working areas during non working times in plant settings to be violative of the Act. See *Loudon Steel, Inc.,* 340 NLRB No 40, JD slip op. at 8 (2003), and *Stoddard-Quirk Mfg. Co.,* 138 NLRB 615, 619, 623 (1962).

I find that Stapleton violated Section 8(a)(1) of the Act in several respects concerning his September 26, 2001, conversation with Holl. First, I find that Stapleton created an overly broad no solicitation rule by informing Holl that if he wanted to talk union he should do it on his own time, “not company time.” See *Litton Systems,* supra; and *Kenmore Mercy Hospital,* supra.[20] During the same conversation in which Stapleton told Holl not to talk about the Union on company time, he also told Holl he was being closely watched. I find that by informing Holl that he was being closely watched in the circumstances here would reasonably lead Holl to conclude that his union activities not his extended restroom break caused Respondent’s reaction, and therefore Stapleton’s statement that Holl was being closely watched created the impression of surveillance of Holl’s union activities in violation of Section 8(a)(1) of the Act. See *Seton Co.,* 332 NLRB 979, 980 (2000).

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[19] The presumptions of validity or invalidity of the no solicitation rules can be rebutted by appropriate evidence. *Our Way,* supra fn. 6.

[20] Considering the witnesses’ demeanor and the content of their testimony, I have credited Holl’s version of this conversation over Stapleton’s and therefore I do not credit Stapleton’s claim that he qualified his remarks by telling Holl that he could talk about the union during Holl’s lunch and break periods.

I also find that the warning dated September 7, 2001, was placed in Holl's file in violation of Section 8(a)(1) and (3) of the Act. The warning was clearly issued because of Respondent's belief that Holl was engaged in union activity.[21] Respondent's officials prior contacts with Durco, Short and Reens, as set forth above, demonstrate Respondent harbored strong animus towards employees' union activity. Therefore, counsel for the General Counsel has met her burden of proof under the Board's *Wright Line analysis* and the burden shifts to Respondent to prove that it disciplined Holl for lawful reasons.[22] I have concluded Respondent has not met that burden. Stapleton failed to explain why the warning was not shown to Holl, why Holl was not asked to sign it, or why it predated by 3 weeks the time incident was first discussed with Holl, supporting an inference that the warning was written some time after the fact in order to create a record for Holl's file. I find that Holl was not disciplined out of a concern for loss of productivity as Stapleton contended, but rather for the Employer's belief that he was talking to his co-workers in favor of the union. In this regard, no explanation was given why Holl's co-workers who engaged in the conversation with him and were similarly away from their assignments were not disciplined. Moreover by informing Holl that he could not discuss the union during company time Stapleton created an overly broad no-solicitation rule thereby rendering as violative of the Act any discipline he issued pursuant to his pronouncement. See *Laidlaw Transit, Inc.,* supra. at 83; and *Switchcraft Inc.,* supra. at 986.

I also find Respondent's published no solicitation rules contained in its March 2001 employee handbook are overly broad in violation of Section 8(a)(1) of the Act. See *Loudon Steel, Inc.,* 340 NLRB No. 40, JD slip op. at 8 (2003), where the mere maintenance of an overly broad no solicitation rule was found to violate the Act. Respondent's March handbook under the heading of solicitation states that employees must "have prior authorization from the Human Resource Department or plant management" before engaging in solicitation. The Board has found the imposition of such prior approval requirements before employees can engage in protected solicitation and distribution activities to be facially unlawful. See *Baptist Medical Center/Health Midwest,* 338 NLRB No. 38, JD slip op. at 13 (2002); *Teletech Holdings, Inc.,* 333 NLRB 402, 403 (2001); and *Lake Holiday Manor,* 325 NLRB 469, 478. Respondent's rule also implies that solicitation will be limited to such things as "Girl Scout cookies or school fund raising sales" suggesting that Respondent would disapprove other types of solicitation such as solicitation for a union. Finally, Respondent's rule states that solicitation is limited to non work areas. While an employer can limit distribution to non work areas, it cannot limit oral solicitation to non work areas in a plant setting. Respondent's assertion in its brief that Holl was limited to non work areas for union solicitation confirms that it meant to apply this rule to oral solicitation. See *Loudon Steel, Inc.,* supra., JD slip op. at 8, and *Stoddard-Quirk Mfg. Co.,* supra. at 619, 623. I also find Respondent's published disciplinary rule that "Personal business may not be conducted during working hours," to constitute an overly broad no solicitation rule, and its maintenance is violative of Section 8(a)(1) of the Act. See, *Our Way,* supra., at 394-395.[23]

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[21] While Respondent was mistaken in its belief that Holl was engaged in union activity, his discipline still violates Section 8(a)(1) and (3) of the Act. See *Guerdon Industries,* 255 NLRB 610, 617 (1981).

[22] See *Wright Line,* 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[23] The maintenance of Respondent's handbook rules, although not specifically alleged as violations in the complaint, are closely related to the complaint allegation that Stapleton orally promulgated an overly broad no solicitation rule. Moreover, Respondent and the General Counsel introduced Respondent's handbook containing the rules into evidence as a joint exhibit. Respondent also parenthetically references the published rules in its brief when it asserts Holl is free to discuss the union when he was not working and in non work areas. I find that in these

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Respondent held a plant wide meeting off premises on October 12, 2001. Anderson credibly testified to the following: McAlear and Matthews conducted the meeting. McAlear told employees there might be a reduction in hours in the near future and he said if there was a layoff it would be done by seniority.[24] McAlear said there would not be a Christmas bonus and that he did not know if he would put anything in profit sharing that year. Employees' hours were cut shortly after the meeting from 40 hours to 35 hours a week. The reduction in hours lasted around 3 weeks when the employees were returned to 40 hours.

Durco credibly testified he became serious in his efforts to start a second union campaign in the beginning of November 2001. At that time, Durco started asking employees to sign Teamsters cards. However, after talking to Anderson and Reens, they decided they could possibly get more votes if they went with the UAW. Durco testified that, during his lunch break in Respondent's locker room, he borrowed Ramirez' cell phone to try to talk to Laura Torez of the UAW. He testified he had difficulty reaching the UAW rep. Durco testified that as far as he was aware, no one from management heard him make these phone calls. Ramirez testified he learned from Durco around 2 weeks before their December 6 discharge that the employees were trying to start another union. Griffin testified that around November 2001, Durco and Griffin began to discuss the UAW in their work area during their breaks. Reens was present for these conversations.

Around the third week in November, Matthews conducted a meeting in the lunchroom. Durco testified one of the topics of the meeting was abuse of restroom privileges. Durco asked Matthews what if someone was disabled or needed more time in the restroom. Matthews replied anyone ill or disabled should not be working at Respondent. Durco pointed to the labor laws posted on the wall and asked Matthews if he was aware this was discrimination. Matthews did not respond, but moved to another issue.

There is a documented verbal warning in Durco's personnel file dated November 27, 2001, stating, "Tony was witnessed by a member of upper management to have gone and gotten a newspaper and went to the bathroom for 24 min. This behavior is unacceptable and will not be tolerated in the future." Durco filed a grievance over the warning on November 27, under the Respondent's grievance procedure. Durco stated in the grievance that, "According to Joe Matthews meeting employees should limit the time and frequency spent in the restroom during non-break times. I addressed Joe about what if someone was sick or had an illness. He replied anyone that is sick or had a disability shouldn't be working at Service Spring. I pointed out that was discrimination. I feel like I am being harassed because there was another employee in the bathroom the same time I was, and nothing was said to him. Just Me."[25] Zankl issued a response dated November 28, 2001, denying Durco's grievance. Durco credibly testified he spoke to Zankl the day he received the response to the grievance. Durco told Zankl

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circumstances the published rules are closely related to outstanding complaint allegations and have been fully litigated warranting a finding that they are unlawful. See *Garfield Electric,* 326 NLRB 1103, 1107 (1998); *Stoughton Trailers, Inc.,* 234 NLRB 1203, 1207, fn. 19 (1978); and *Stoddard-Quirk Manufacturing Co.,* 138 NLRB 615, 623 (1962).

[24] Holl confirmed, and McAlear conceded, that during the meeting McAlear announced if there was a layoff it would be by seniority.

[25] During his testimony at the hearing, Durco denied being in the bathroom for 24 minutes on November 27. Durco's November 27 warning is not alleged to be violative of the Act, nor was it contended that his protest over the enforcement of Respondent's restroom rules to Matthews was protected activity.

they should not bother employees who were just using the restroom as opposed to abusing it. Durco asked Zankl if she realized this was opening a new can of worms, and she asked what he meant. Durco said he could not say anything more at that time.

Griffin credibly testified that shortly before his December 7, 2001, termination, he complained to Matthews about being transferred around so frequently shortly. Matthews replied that because of Griffin's knowledge of several departments and Griffin's being very flexible, if there was a layoff, he would be one of the last to be laid off.

Short credibly testified to the following: Around 2 or 3 days before his December 7 termination, Short learned employees were again trying to organize a union. Short was in the locker room when Durco approached Short. Durco said he had been in contact with a lady from the UAW. Durco said they would get together and see how much support they had and if they did not have enough support they would not go forward with the election. Gillespie was about 5 to 10 yards from Short at the time of the conversation. Gillespie was staring at Durco and Short. Short, acknowledged in his pre-hearing affidavit that he did not think Gillespie could hear what he was saying.

2. Gillespie's December 5, 2001, interrogation of Durco and Reens

Durco and Reens' credibly testified about conversations they had with Gillespie, the crew leader of the mandrel department, on December 5, 2001. Durco testified that: Gillespie spoke to Durco in the UPS department at Durco's workbench. Gillespie said to Durco, "I heard they're taking another Union head count." Durco said he was not aware of it. Gillespie asked if Durco still thought a union would be good, and Durco said yes. Gillespie asked how, and Durco said in many ways. Durco said Respondent was discriminating against Griffin by yanking him around from department to department. Gillespie asked what Durco thought of management and he replied he did not think they learned their jobs yet. Durco said he had taken a piece of paper and drawn a line down the middle pertaining to Matthews placing the positive things on one side and the negative on the other and that he came up with only three or four things on the positive side and ran out of space on the negative side. Gillespie agreed management was bad. At that time, Reens was close by and made a comment. Gillespie turned to Reens and started a conversation pertaining to the same topic and they walked away talking about it.

Reens testified that: Reens had a conversation with Gillespie in the UPS department. Durco, Griffin, and Josh Wellington, a mandrel operator, were present for part of the conversation. Gillespie approached Durco. Reens was about 5 or 6 feet away. Reens heard Gillespie say to Durco, "I hear you're taking a Union count," and then they started the conversation about why they needed a union. Reens could not hear the whole conversation because of his distance from the two. Gillespie spoke with Durco for several minutes then Gillespie approached Reens and asked, "What's going on with the Union?" Reens responded, "Nothing." Gillespie said, "Well, why do you guys need the Union then?" Reens said for protection and job security. Reens said, "Look at Altino Griffin, here's a guy that they gave a two-week layoff or a three day layoff, whatever, for running 12 springs wrong. John Vincent run 400, the whole cart full, and they didn't do a thing to him. It was just a 'honest mistake', that's okay." Reens said things like that were unfair and discriminatory against Griffin. Reens also told Gillespie that Anderson told Reens that, during a crew leaders meeting, Jeff Reau accused Reens of smoking in the restroom, which Reens denied. Reens said Reau was in there lying about him, so they needed the union for protection.[26]

[26] I have credited Durco and Reens testimony as set forth above. Each testified with

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a. Analysis

In *Sanderson Farms, Inc.,* 340 NLRB No. 59, JD slip op. at 5 (2003), the following principles were set forth concerning the alleged unlawful interrogation of employees:

> The test frequently applied in allegations of illegal interrogation is the one that was applied in *Bourne v. NLRB,* 332 F.2d 47 (see *Dorn's Transportation Co.,* 168 NLRB 457 (1967). The criteria applied there included, (1) the background; (2) the nature of the information sought; (3) the identity of the questioner; (4) the place and method of interrogation; and (5) the truthfulness of the reply.
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> * * *
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> The Board has determined that an examination of the above criteria need not involve a strict evaluation of each factor. Instead, the "flexibility and deliberately broad focus of this test make clear that the *Bourne* criteria are not prerequisites to a finding of coercive questioning, but rather useful indicia that serve as a starting point for assessing the 'totality of the circumstances.'" *Westwood Health Care Center,* 330 NLRB 935 (2000); citing *"D" Purdue Farms Inc. v. NLRB,* 144 F.3d 830 (D.C. Cir. 1998); *Timsco, Inc. v. NLRB,* 819 F.2d 1173 (D.C. Cir. 1987).

The Board will also consider who initiates the conversation and whether the employee being questioned is an open union supporter at the time of the questioning in determining whether the questioning is coercive. See *Sundance Construction Management,* 325 NLRB 1013 (1998).

In *Medcare Associates, Inc.,* 330 NLRB 935, 940, fn. 17 (2000), it was stated that in determining whether an alleged interrogation had a reasonable tendency to coerce employees, the Board is not barred from taking into account "events or statements that occurred before or after the particular incident in question that may throw light on its significance. An employee may reasonably come to realize only after the fact, in light of subsequent statements or events, that seemingly benign questions were actually efforts to ferret out his union sentiments by an employer hostile to union activity."[27] In *Medcare Associates, Inc.,* supra, at 942, the respondent's officials multiple conversations questioning employees about their union activities were found to constitute unlawful interrogations, as the Board majority found the conversations "were coercive in the context of the entire course of events." Similarly, in *U.S. Web, Inc.,* 327

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specificity and in a credible and corroborative fashion as to their conversations with Gillespie. Moreover, while Respondent admits Gillespie is its supervisor and agent, Respondent failed to call him as a witness warranting a conclusion that, if called, Gillespie would not dispute Durco and Reens' accounts of these conversations. I do not find Griffin's failure to testify about these conversations undermines Durco and Reens' credible and undenied testimony. In this regard, Reens testified that Griffin was only present for part of the conversation and Reens testified Reens had trouble hearing Durco's conversation with Gillespie although Reens was only a short distance away. Moreover, Griffin testified about several matters and his failure to testify about this event in the circumstances here is not sufficient to undermine Durco and Reens' credible testimony.

[27] Statements or conduct outside the 6 month limitations period under Section 10(b) of the Act for a finding of a violation can also be considered as background evidence of animus towards union activity. See *Campbell Electric Co.,* 340 NLRB No. 93, JD slip op. at 7, fn. 9; *Wilmington Fabricator, Inc.,* 332 NLRB 57, 60 fn. 6 (2000); *Kaumograph Corp.,* 316 NLRB 793, 794 (1995); and *Douglas Aircraft Co.,* 307 NLRB 536, fn. 2 (1992) enfd. 66 F.3d 336 (9th Cir. 1995).

NLRB 132, 132, fn. 2 (1998), the Board majority found the respondent to have coercively interrogated an employee when he was questioned by a company official about his union activities in the presence of other employees, and then discharged 6 weeks later. It was stated that given the employee's eventual fate the employees present for the questioning were not likely to miss the not to subtle message that "the Respondent would retaliate against employees suspected of union activities."

I find that Respondent has exhibited a background of hostility towards employees' union activity. I have previously found that, prior to the Teamsters election in October 2000, Marilyn McAlear, Respondent's chief financial official and parent of Respondent's president, approached Durco and coercively interrogated him about his union activity, made an implied promise of a better job if Durco ceased his union activity, and made an implied threat of bodily harm when Durco refused to accede to her request. I have found that shortly thereafter, Matthews approached Durco asked Durco to give Matthews a chance to prove himself, and for Durco to use his influence on other employees to call off the election. When Durco refused Matthews request, Matthews repeatedly blocked Durco's attempt to return to his workbench while stating, "we don't need a union here." I have concluded Matthews conduct, coming on the heels of Marilyn McAlear's questioning and threat was coercive and exhibited animus on the part of Respondent's officials at the highest levels. I have found that during this same time period, Matthews and Radabaugh targeted Reens who they perceived as a leader of the union movement and attempted to pressure him to use his influence with other employees to short circuit the election process by making implied promises of benefits. I found their conduct was coercive and constituted background evidence of animus. I have also found that shortly after the election results were certified in May 2001, Matthews called separately called Reens and Short into Matthews' office, solicited grievances, and coercively interrogated them about their union activities prior to the election, including questioning Short how he had voted.

Within the Section 10(b) period, I have found Respondent violated Section 8(a)(1) of the Act by maintaining an overly broad no solicitation rule in its employee handbook, and by Stapleton's announcement of an overly broad no solicitation rule during his meeting with Holl in late September 2001, during which Stapleton also created the impression of surveillance of Holl's union activities. I have found that Stapleton violated Section 8(a)(1) and (3) of the Act, by placing a warning in Holl's file as a result of Holl's union activity. Thus, I have concluded that Respondent's officials have created a background demonstrating strong animus towards union activities amongst its employees.

The Board also considers whether employees are open union supporters at the time of questioning in determining whether they were coercively interrogated. While Durco had been an open union supporter prior to the October 2000 election as well as in attending the December 2000 hearing on objections, he changed his mode of operation in 2001 after the election results were certified and the Teamsters lost. Durco authored a letter to McAlear in July 2001, stating that a union had been contacted, and requesting certain job security guarantees on behalf of all of Respondent's employees in lieu of the initiation of another union campaign. However, Durco did not sign the letter and he had another employee deliver it. Moreover, when Durco filed an internal grievance over a discipline he had received towards the end of November 2001, he informed Zankl when she denied the grievance that this would open a new can of worms, but he refused Zankl's request to explain further. There was also no evidence that either Durco or Reens had openly announced to management that they intended to renew their union activities when Gillespie approached them and questioned them on December 5, 2001. In fact, both Durco and Reens initially denied Gillespie's' question that they were starting another union campaign at the outset of their conversations, although each subsequently gave a truthful response following Gillespie's further probing.

Durco and Reens testimony reveals they began to actively discuss contacting the UAW in November 2001. On December 5, 2001, Gillespie approached Durco in Durco's work area and said, "I heard they're taking another Union head count." Durco said he was not aware of it. Gillespie asked if Durco still thought a union would be good, and Durco said yes. Gillespie asked how, and Durco said in many ways. Durco said Respondent was discriminating against Griffin by yanking him around from department to department. Gillespie asked what Durco thought of management and he replied he did not think they learned their jobs yet, and Durco was particularly critical of Matthews. When Gillespie finished with Durco, Gillespie approached Reens and asked, "What's going on with the Union?" Reens responded, "Nothing." Gillespie said, "Well, why do you guys need the Union then?" Reens said for protection and job security. Reens cited Griffin as an employee who in Reens view had been treated unfairly and in a discriminatory fashion. Reens also told Gillespie that Anderson had told Reens that superintendent Reau had accused Reens of smoking in the restroom during a crew leaders meeting. Reens told Gillespie that Reau was lying about him, so they needed the union for protection.

I find, considering the totality of the circumstances, Gillespie's questioning of Durco and Reens just two days before their discharge constituted coercive interrogations of employees about their union activities and the union activities of other employees in violation of Section 8(a)(1) of the Act.[28] Gillespie is the crew leader in Respondent's mandrel department. As such he had 6 machines and 5 or 6 employees under him. Gillespie was in charge of one of Respondent's main production areas, as a result, unlike most of the other crew leaders, Gillespie reported directly to Vice President of Operations and Plant Manager Matthews in December 2001. Respondent has shown a strong hostility to employees' union activity by its upper level officials issuing a threat, promises of benefits, interrogations, and creating the impression of surveillance of employees union activities, and some of this conduct, occurring prior to their December 5, 2001, conversation with Gillespie, had been directed specifically towards Durco and Reens. Most significantly, on December 7, within 2 days of Gillespie's questioning of Durco and Reens, Respondent laid off 10 employees, including Durco, Reens, Griffin, and Anderson, the latter two whose names had been raised by Durco and/or Reens to Gillespie as reasons for needing a union. Three of the other individuals being laid off were openly active in the 2000 union campaign, and Holl had been disciplined for what Respondent believed to be his union activities in September 2001. Moreover, the seven individuals laid off were attempting to start a second organizing drive in 2001. The lay off was a permanent lay off, and seniority was not used as a factor in the selection process, although in mid-October 2001, Respondent's officials had announced to employees that if a layoff was necessary it would be based only on seniority. Gillespie's questioning of Durco and Reens on December 5, took on an ominous tone in light of their layoff, along with other union supporters, on December 7. Accordingly, I find Gillespie's December 5 questioning of Durco and Reens to be a coercive interrogation in violation of Section 8(a)(1) of the Act. See, *Medcare Associates, Inc.,* supra., and *U.S. Web, Inc.,* supra.[29]

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[28] By stating to Durco "I heard they're taking another Union head count," and asking Reens why do you guys need the Union then, Gillespie questioned Durco and Reens about the union activities of other employees as well as their own activities.

[29] I do not find Gillespie unlawfully solicited employee grievances during his questioning of Durco and Reens on December 5, 2001 because I do not find the employees could reasonably believe that Gillespie questioned them as part of an effort to gain information to remedy their grievances. Accordingly, paragraph 7(b) of the complaint is dismissed.

3. The December 7 permanent layoff

On December 7, 2001, Durco, Anderson, Reens, Short, Ramirez, Griffin, and Holl were separately called into Matthews' office. Matthews, Stapleton, and Zankl were present. Durco testified Matthews said he was going to read a statement. There is a statement in Durco's file, which reads; "Due to economic reasons and organizational restructuring, the management team has reviewed all employees based on a multi-factored matrix. Your overall performance did not meet the minimum criteria set forth by the team. Due to this fact, your last day of employment with Service Spring Corp will be today, effective immediately." Durco was then escorted through the lunchroom to the locker room and told to clean out his locker. Durco told Matthews you are making a big mistake. Durco said he was glad he got in contact with the union when he did. Anderson's testimony reveals he went through a similar scenario. He testified there was a police officer in the hallway. Anderson testified that as he was cleaning out his locker, Anderson said to Matthews, "I know you got rid of us for union activity." Matthews did not respond. Holl, Short, Griffin, Reens, and Ramirez' testimony reveal they were let go in similar fashion. Holl said, during his meeting, what is going on, you said you were going to lay people off by seniority. Matthews said they were not going to do it that way. Griffin said 3 days earlier, Matthews was telling Griffin he was a good worker and he would be one of the last let go if there was a layoff.[30]

a. Analysis

1. The layoff decision

In order to prove that an employee is discriminated against in violation of Section 8(a)(3) of the Act, the General Counsel must persuade by a preponderance of the evidence the employee's protected conduct was a motivating factor in the employer's decision. If the General Counsel makes such a showing, the burden of persuasion shifts "to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." *Wright Line,* 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). The elements commonly required to support a finding of discriminatory motivation are union activity, employer knowledge, and employer animus. *Farmer Bros. Co.,* 303 NLRB 638, 649 (1991), enfd. mem. 988 F.2d 120 (9th Cir. 1993). Even absent direct evidence of animus, the Board will infer it based on the entire set of circumstances including suspicious timing of an alleged discriminatory event in relation to the employee's union activity. See *Washington Nursing Home,* 321 NLRB 366, 375 (1996); See, *La Gloria Oil and Gas Co.,* 337 NLRB 1120, 1124 (2002); and *Electronic Data Systems Corp.,* 305 NLRB 219, 220 (1991) enfd. 985 F.2d 801 (5th Cir. 1993). Similarly, suspicious timing is one of the factors that will give rise to an inference of an employer's knowledge of an employee's union activity. See, *La Gloria Oil and Gas Co.,* supra. at 1123; *Metro Networks,* 336 NLRB 63, 65 (2001); *Medtech Security, Inc.,* 329 NLRB 926, 929-930 (1999).

A layoff will be found to be unlawful when it is demonstrated that the aim of the layoff is "to discourage union activity or to retaliate against employees because of the union activities of some," even though "employees who might have been neutral or even opposed to the Union

[30] Three other individuals were also laid off on December 7, 2001, two office workers and one plant worker. Counsel for the General Counsel represented at the hearing the plant worker was dropped from the original charge by way of amendent; and the Regional office concluded one of the office workers was a managerial employee. The General Counsel did not proceed on behalf of any of these three individuals in this proceeding.

are laid off with their counterparts…." See *McGaw of Puerto Rico, Inc.,* 322 NLRB 438, 451 (1996), enfd. 135 F.3d 1 (1st Cir. 1997); *Birch Run Welding & Fabricating v. NLRB,* 716 F.2d 1175, 1180 (6th Cir. 1985); *Weldun International,* 321 NLRB 733, 748 (1996) enfd. in part 165 F.3d 28 (6th Cir. 1998); *Davis Supermarkets,* 306 NLRB 426 (1992) affd. and remanded 2 F.3d 1162, 1168 (D.C. Cir. 1993); *Mini-Togs, Inc.,* 304 NLRB 644, 648 (1991) enfd. in part 980 F.2d 1027 (5th Cir. 1993); and *ACTIV Industries,* 277 NLRB 356 fn.3 (1985). This theory is applicable even when all union adherents are not discharged. See *McGaw of Puerto Rico, Inc.,* supra. at 451. When assessing the reasons an employer advances for a layoff the Board will consider whether the layoff is being carried out in such a way as to disproportionately remove union supporters. See *Clark Distribution Systems,* 336 NLRB 747, 749 (2001). The timing of the layoff is another factor demonstrating unlawful motive. See *Alliance Rubber,* 286 NLRB 645, 647 (1987) where a layoff was found unlawfully motivated when "there was no convincing nondiscriminatory reason advanced for the particular day chosen" for the layoff; *Hunter Douglas, Inc.,* 277 NLRB 1179, 1180 (1985) enfd. 804 F.2d 808 (3rd Cir. 1986), where the abruptness of a layoff coming at the time of a union drive, supported an inference of an unlawful motivation; and *Birch Run Welding & Fabricating v. NLRB,* supra. at 1180, where the court noted that there was no evidence of a change in the employer's financial condition from its prior announcement to employees that it wanted to avoid additional layoffs to substantiate its decision to layoff 13 employees within hours after becoming aware of a union's organizational efforts.

Respondent called McAlear, Zankl, Matthews, and Stapleton to testify. According to their testimony, McAlear and Zankl were instrumental in determining there was a need for the December 7, 2001, permanent reduction in force, and Matthews and Stapleton were principally relied on to evaluate the plant employees including the alleged discriminatees to determine which individuals should be selected for permanent layoff. I found their testimony to be often contradictory between witnesses, internally inconsistent and for the reasons set forth below not worthy of belief.

Matthews by the nature and content of his testimony impressed me as an intelligent individual who prided himself with an attention to detail. Matthews was hired as plant manager on July 26, 2000, and by his own admission was frequently out on the shop floor. Yet, Matthews claimed that he was not aware that Reens, Griffin, Ramirez, and Holl were union supporters at the time of their December 7, 2001 terminations.[31] Matthews incredibly denied knowing Holl was a union supporter, although Stapleton testified he disciplined Holl in September 2001 when Stapleton received reports from Gillespie that Holl was leaving his workstation and harassing employees by talking to them about the union. Matthews in fact testified he was the one who instructed Stapleton to discipline Holl for leaving his workstation in 2001. I do not find it plausible that Matthews' subordinates merely notified him there was a problem with Holl leaving his workstation, but failed to relate to Matthews that they thought union activity was the motivation behind Holl's departures. Accordingly, I do not credit Matthews claim that he was unaware that Holl was a union supporter at the time of the December 7, layoff.

Similarly, Reens, Griffin, and Ramirez testified that they wore union paraphernalia to work prior to the October 2000 election, and Reens credibly testified that Matthews' solicited Reens support to terminate the election process prior to the election and Reens refused his request stating the employees needed a union. Reens also credibly testified Matthews called

[31] Matthews and Zankl admitted knowledge that Durco and Short were union supporters because they attended the hearing on challenged ballots.

him into his office following the certification of election results in May 2001, and stated he knew Reens was a strong union supporter. Matthews' claim of about lack of knowledge of Reens and Griffin's pro union stance was further undermined by Zankl's testimony. Zankl did not have an office on the plant floor and she was not directly in charge of these employees as was Matthews. Yet, Zankl testified it appeared Griffin was a union sympathizer based on reports she had received from pro-company employees, and because she was aware that Griffin was affiliated with pro-union employees. Zankl similarly testified she could guess Reens was a union supporter by the employees he associated with.

Similarly, Matthews' testimony that, within two months prior to December 7, 2001, he was not aware of any rumors about another union campaign lacked credibility. In this regard, Durco's credited testimony reveals a letter was delivered to McAlear during the end of July 2001, threatening another union campaign if the employees were not given certain assurances about job security. In August 2001, Respondent brought in an outside consultant for meetings with its crew leaders and management staff where union organizing was discussed. During one of the meetings, Anderson's credited and undisputed testimony reveals McAlear made the statement that there was talk of union organizing throughout the plant and the employees would probably start to organize again when they learned there would be no Christmas bonus. Towards the end of September 2001, Matthews directed Stapleton to discipline Holl for leaving his job. Stapleton testified the disciplined arose because he received reports from Gillespie that Holl had been leaving his job and harassing people about the union.

In November 2001, Durco, Reens, Anderson, and Griffin began talking among themselves and with other employees including Ramirez and Short about starting a union campaign with the UAW rather than the Teamsters. Towards the end of November, Durco was disciplined for spending too much time in the restroom. He grieved the discipline through the Respondent's internal procedure, and when the grievance was denied Durco told Zankl this would open up a new can of worms.

On December 5, 2001, Gillespie interrogated Durco and Reens about their union activity, separately informing them that he heard it was starting up again. During the conversation, Durco and Reens each cited discriminatory treatment of Griffin, and Reens stated that Anderson reported to him that Reens had been falsely accused of smoking in the restroom as reasons for needing a union. Within two days of this conversation, Respondent without warning permanently laid off 10 employees, eight of them were plant employees, seven of who were the alleged discriminatees. Thus, out of the eight hourly plant employees who were laid of on December 7, 2001, Durco and Reens had told Gillespie on December 5, that they were again interested in starting a union, and had implicated Griffin and Anderson in their union activities to Gillespie during the conversation. Of the other individuals laid off, Short had attended the hearing on challenges for the union and reaffirmed his support to the union following the election when Matthews questioned him about how he voted in the election. Gillespie had also seen Short talking to Durco shortly before the layoff. Holl was disciplined for union activity in late September 2001, and Ramirez wore union paraphernalia, and worked with Reens and Durco for a period of time. As set forth above, Zankl's testimony reveals Respondent's officials suspected employees of supporting the union based on the people they associated with. Accordingly, I do not credit the claims of Respondent's officials that they were unaware that all of employees named in the complaint were union supporters at the time of their layoff.

At the time of the layoff, Respondent rated 64 hourly paid plant employees, including crew leaders, as part of its layoff selection process. Only 24 of 48, or 50 percent of the employees had voted for the Teamsters at the time of the October 2000, union election. Yet, although the selection pool for plant employees for layoff increased to 64 in December 2001,

seven of the eight or 87 percent of the plant employees who were laid off were strong union supporters. Moreover, all of these seven employees worked with or otherwise associated with Durco, the leading union adherent, and they had all renewed their union activities shortly before the layoff. The high proportion of union adherents selected for layoff suggests that Respondent implemented the layoff and its selection process to target those employees. See *Clark Distribution Systems,* 336 NLRB 747, 749 (2001).

Considering the timing of the December 7, layoff, just two days after Durco and Reens were interrogated by Gillespie about their union activities, as well as the substance of McAlear, Zankl, Stapleton, and Matthews' testimony and their demeanor, I do not credit their claims that they did not discuss with Gillespie or were otherwise unaware of the results of Gillespie's December 5, questioning of Durco and Reens about their union activity, at the time Respondent initiated the reduction in force and selected the alleged discriminatees to be included in the layoff. See, *La Gloria Oil and Gas Co.,* supra. at 1123; *Metro Networks,* 336 NLRB 63, 65 (2001); *Medtech Security, Inc.,* 329 NLRB 926, 929-930 (1999); *Darbar Indian Restaurant,* 288 NLRB 545 (1988); and *Montgomery Ward & Co.,* 316 NLRB 1248, 1253 (1995), enfd. mem. 97 F.3d 1448 (4th Cir. 1996). Accordingly, I have concluded that Respondent's officials were aware Durco, Reens, Griffin, Ramirez, Holl, Short, and Anderson were union supporters at the time of their December 7, 2001, terminations.

I find the General Counsel has a established a prima facie case under the Board's *Wright Line* requirements that the December 7, 2001, permanent layoff was because of the employees' union activity in that the layoff occurred just days after Gillespie unlawfully interrogated Durco and Reens about the start of another union campaign. I infer and find that Gillespie, who was reporting to Matthews at the time, forwarded this information to Matthews, and it quickly spread to Respondent's management staff.[32] I note that Stapleton testified that Gillespie had in the not too distant past informed management of Holl's union activity. I also find that the swiftness of the permanent layoff, just two days after Gillespie's' December 5, unlawful interrogation of Durco and Reens, creates the inference that the December 7, 2001, layoff of the seven alleged discriminatees was due to their union activities. This is particularly so since as of mid October 2001, McAlear had told employees that if there was a layoff it would be by seniority, and admissions by Respondent's officials that there was no discussion of a permanent layoff at that time. Yet, on December 6, 2001, Respondent created a nine factor layoff selection process that did not include seniority as one of the listed factors.

Since the General Counsel has established a prima facie case under *Wright Line* of knowledge of the employees' union activities by Respondent's officials, animus towards those activities, and as well as the timing of the layoff that the layoff was a result of those union activities; the burden shifts to Respondent to demonstrate the December 7, 2001, permanent layoff would have occurred even absent the employees union activities. For the reasons set forth below, I find that Respondent has failed to meet this burden.

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[32] Matthews denied knowledge of Gillespie talking to any employees about union activity until after the unfair labor practice charge was filed over the layoff. Matthews testified when he learned of it, Matthews was, "Truly horrified. I knew that that was not a good thing. I knew that he should not have done that." While Matthews denied being informed of the conversation prior to the layoff, Matthews testified, "that's something that would have been brought to my attention immediately." Noting that it was Respondent's contention that Gillespie was part of management, I concur with Matthews on this point and conclude that Gillespie's conversation with Durco and Reens was brought to Matthews' immediate attention.

McAlear testified that in 2000, Respondent experienced around 8 percent growth in sales, which was slowing down from the past when there had been between 12 to 15 percent growth a year. Yet, McAlear testified he was hoping for at least an 8 to 10 percent growth in 2001. Zankl testified that, in anticipation of double digit growth in sales 2001, Respondent hired additional employees in the beginning of 2001 and acquired new machinery called auto ovens. In fact, despite a decline in 2000 from its prior annual sales growth rates, Respondent's records reveal it hired 18 new plant employees in 2000 marked as general labor. Respondent continued to hire in 2001, hiring an additional seven plant employees by February 26.

Zankl testified that, upon reviewing Respondent's financial statements, she became concerned around the end of February 2001 that direct labor costs were becoming too high of a percentage of cost of goods sold.[33] Zankl testified they stopped hiring new employees at the end of February, and she and McAlear reviewed the situation on a near weekly basis.

Despite its concern of rising costs of direct labor, Respondent instituted a new wage leveling increase for its hourly employees in May 2001. Zankl estimated this cost Respondent 30 to 40 thousand dollars that year in addition to the usual biannual wage increases for the hourly employees that were given in 2001. Matthews testified the May increase was done as part of the process of separating employee wage increases from their evaluations. Matthews testified that, as a result of complaints he received from employees, the May increase was to catch people up who did not receive full increases in the past due to poor evaluations. However, Matthews also claimed the crew leader evaluations of employees were too generous in the past in order to allow people to receive their full raises. Thus, following the election, and despite a declining economic situation, Respondent prompted by employee complaints felt compelled to compensate people who did not receive full increases in the past although Matthews testified the old rating system was overly biased in their favor.

McAlear testified that September 2001 gross sales were 14 percent under those in September 2000. He testified that in September 2001, they came to the realization that expectations could not be achieved in 2001. When asked whether there was a time that Zankl and McAlear concluded direct labor costs were excessive, McAlear testified, "Well, I think later in the year. I mean, end of third quarter. Fourth quarter I didn't see much -- you know, I -- I kind of saw the writing on the wall, if you will." McAlear also testified that gross sales in 2001 were about the same as they were in 2000, however, there was an inordinate amount of growth in the direct labor costs and related benefits in 2001, which caused a decline in profitability. Similarly, Zankl testified by the end of the third quarter in 2001, it was obvious that the cost of direct labor was out of whack and Respondent's officials had a good idea of where they were going for the year financially. Zankl testified that, using Respondent's accounting software, they could review the situation "monthly or quarterly," which gave them "a pretty good estimate." Zankl testified that by end of September, first week in October, they had a good estimate of where they stood concerning the cost of goods and the cost of direct labor.[34]

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[33] The components of costs of goods sold are direct labor costs and materials used.

[34] Respondent's monthly and quarterly reports for 2001 were not entered into evidence. Rather, Zankl prepared a chart for the trial showing Respondent's direct labor cost as a percentage of cost of goods sold as 17.23% in 1999, 16.98% in 2000, and 20.69 % in 2001. Zankl testified Respondent's operational goal was to have direct labor costs at about 17 to 18 percent of costs of goods sold. Zankl calculated that it cost Respondent about $368,000 in 2001, because the direct labor costs were above the 17 percent operational goal, although she testified Respondent did make a small profit in 2001. However, Zankl testified Respondent did not have the information to make these precise calculations at the time of the layoff in

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McAlear testified that on October 12, 2001, McAlear called a plant meeting. During the meeting, McAlear spoke of possible reduction in hours, or of a possible layoff. McAlear testified that he informed the employees that layoffs, if necessary, would be by seniority. Zankl prepared the agenda for the meeting, it included a statement that McAlear was to address what was already being done to contain cost, including "V.P. wage reductions, wages freeze for salaried employees, shift leveling, voluntary home early, NO YEAR END-BONUS." Zankl prepared a memo for her portion of the meeting. It states sales are flat, and September 2001 was a 14 percent decrease in total sales from September 2000, which was the largest decrease in monthly comparisons for many years. It states profitability at the end of the third quarter of 2001 was 1/3 of what it was in 2000. The memo states, "So what has happened!!! Sales have remained flat, but expenses have increased across the board." The memo states, "Labor and associated expenses such as benefits have increased dramatically (due mainly to the increased number of employees, pay rate leveling, and incentive programs)." It states, "direct labor (which includes just the hourly plant employees) payroll expense is up 27% over last year, activity had not increased but expenses have significantly." The memo also spoke of investment of a lot of money in new equipment with an increase in expense of 31 percent over the prior year to get new equipment running. Respondent reduced the hours of plant and office employees for around 3 weeks after the October 12 meeting. Salaried employees were put on hold for any wage increases until around January or February 2002. Zankl testified that, at the time of the October 12, 2001, meeting, Respondent had not considered the permanent reduction in force option that it eventually implemented on December 7, 2001.

McAlear testified as follows: The economic situation with the rise in direct labor costs became obvious in September, but Respondent's officials began talking about it in earnest towards the end of the fourth quarter. They had options of doing nothing, of reducing hours, of a layoff, or of a reduction in force. Respondent never had a layoff up to that point. They decided against a reduced workweek because it did not allow them to get the product out at a fast enough pace. It was decided there would be a plant wide review of the whole organization. The most active participants in the discussion were McAlear, Zankl, and Matthews, but Radabaugh was also involved. The determination was made some time late November or early December to have a permanent work force reduction, rather than a layoff based on a discussion between McAlear, Zankl, Matthews, and Radabaugh during which it was concluded that a lay off by seniority would not allow them to properly serve their customers. It was discussed that there was a "lot of dead wood" in the organization and a permanent reduction in force and finding a team for the future made the most sense. Around the end of November they made the decision as to the number of employees to be discharged based on a formula Zankl developed.[35]

December 2001, because Respondent's accountant does not compile this information until March 2002. She testified that at the time of the layoff they had close figures, but not the same figures she used in her charts at the hearing. Zankl prepared a chart for the trial showing the average hourly wage rate for an employee in 2001 was $13.30 an hour, or $27,664.00 for the year. Based on these calculations and her projected direct labor costs of $368,402.36 in 2001, Zankl calculated Respondent needed to reduce its work force by 13.31 employees in order to maintain the direct labor costs at 17 percent. Zankl testified this calculation does not take into account cost of benefits, such as medical insurance, which was about $5000 per employee. Zankl testified fringe benefits are not included in direct labor cost calculations, so they are not in cost of goods sold. Zankl testified she did not make this precise calculation at the time of the layoff, rather it was a calculation done for the hearing. Zankl testified in December 2001, they just reviewed Respondent's records overall.

[35] Zankl testified it was decided in late November or early December 2001 that the

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Matthews testified that as vice president of operations and as operations manager there were around 60 hourly employees, including crew leaders under his supervision, with a hand full of salaried supervisors. However, Matthews testified in a somewhat different fashion than McAlear as to the events leading to the December 7 layoff. Matthews testified that sometime on December 6, 2001, McAlear announced, during a meeting attended by McAlear, Zankl, and Matthews that there was going to be a reduction in force. Matthews' opinion was not requested as to whether a reduction in force was needed, nor was he asked whether people were busy. He was told it was necessary due to economic reasons. Matthews testified there was a discussion about what the categories should be used for evaluating the workforce during this meeting. Matthews testified the group formulated a list of nine categories, but Matthews did not have a lot of input. The categories are: attendance, discipline, job skills, cooperation with management, flexibility, overtime availability, safety, teamwork, and attitude. Matthews testified they discussed what the categories meant during the meeting.[36] Thus, contrary McAlear's claims, and although Matthews was in charge of the largest segment of Respondent's work force, Matthews' opinion as to whether a permanent layoff was necessary or the impact on Respondent's operations was never solicited. Rather, Matthews was just told it would occur the day before it was implemented.

McAlear testified it was decided the hourly plant and office workers would be reviewed for the reduction in force. Zankl testified that on December 6, late morning or early afternoon, McAlear, Zankl, and Matthews met with then counsel for Respondent Patty Weiss, and they decided there needed to be criteria set to determine which employees were to be terminated.[37] Zankl testified the nine categories for the layoff selection process were chosen that day after the meeting with Weiss. Other than helping formulate the criteria and providing an attendance sheet for the termination selection meeting, Zankl made no other preparations for the termination selection meeting that took place on December 6.[38] Zankl testified there were no written guidelines as to what the nine categories meant, but, "We had in minds what they meant." Zankl testified she learned she was going to be a member of the termination selection committee on the morning of December 6, 2001, during the meeting with McAlear, wherein he announced they had to do something because the economic situation was not good. Zankl typed a memo dated December 6, under McAlear's typewritten signature, addressed to Respondent's vice-presidents, following the December 6 morning meeting. The memo reads:

> As you know and as we have discussed for the past several months, our business activity does not justify our employment levels and we need to take a serious look at the current economic situation at hand. We need to meet immediately to collectively find a solution to the situation. Your attendance is required today at a special meeting beginning at 5 p.m.. I will contact you with details.

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employees would have to be permanently laid off. Zankl testified she and McAlear looked at the figures in prior weeks, and concluded they needed a 10 percent reduction in force. As a result, Respondent terminated eight plant employees and two office employees in the December 7 force reduction. However, Zankl later testified that it was not until they conducted their review on December 6, that they decided the layoff should be permanent because, after rating the employees, they realized certain employees did not fit in with their future plans.

[36] Matthews testified as to detailed definitions for each category.

[37] Weiss no longer represented Respondent at the time of the unfair labor practice trial.

[38] Zankl testified attendance records in consideration were for the period March 1, 2001, to December 1, 2001, as a new attendance policy was put in effect on March 1, when Respondent revised its handbook.

McAlear and Zankl waffled in their testimony concerning the decision not to use personnel files during the reduction in force evaluation process. When asked how the decision came about, McAlear testified, "I'm sure we had a discussion about it. We must have. We wouldn't have just not done it." However, McAlear later testified he did not remember discussing the use of personnel records, stating "I -- I don't remember that coming up at all." Zankl at first testified there was no discussion about using personnel files, only to later testify it was discussed that they were not going to use them because they were evaluating employees against everyone else based on the same criteria. Zankl testified that the ten people who evaluated the employees participated in the discussion on personnel files. Zankl then testified she could not recall the specifics of a discussion about personnel files. When asked if there might not have been a discussion about personnel files, Zankl testified, "I guess you could say that. I mean there was somewhere down the line. Where it took place, I don't -- remember." Zankl then testified she did not know when the discussion about personnel files occurred, who was present, and she could not recall the reasons given for not using them. Matthews testified the need to look at the employee personnel files was not discussed and it was never raised as a possibility. Despite Respondent's officials testimony that the employees' personnel files were not used in the selection process, by position statement to Region 8, dated February 7, 2002, Respondent's attorney Weiss provided disciplinary records from the alleged discriminatees personnel files as documents relied on by Respondent for selecting them for permanent layoff on December 7, 2001.

The parties stipulated that CEO Patrick McAlear, McAlear, Matthews, Zankl, Radabaugh, V.P. Purchasing Tim Szymanski, V.P. Information Systems Brian Knoblauch, Stapleton, Reau, and Accountant Manager Lori Herman were in attendance during the meeting in which it was determined which employees would be permanently laid off. Zankl testified the meeting began at 5 p.m. on December 6, 2001, and it lasted about 5 and ½ hours. The only information brought to the table was the attendance sheet containing the employees' attendance records and a tally sheet listing each employee's name by seniority and the nine rating categories for each employee. Neither the employees' personnel files nor disciplinary records from those files were used in the termination selection process. Matthews testified he found out that he would be part for the reduction in force committee on December 6, 2001, which was also when Matthews first learned the reduction in force was going to take place.

Zankl testified that to the best of her recollection there was a discussion of what each of the nine ratings categories meant at the start of the 5 p.m. meeting. Zankl testified, "Somewhere it was explained. I'm not sure who gave the explanation."[39] Zankl testified that

[39] Zankl testified that the evaluation committee participants were told the following as to the definition of each of the nine ratings categories: The disciplinary category was whether the employees were verbally written up, or coached or counseled. Job skills were based on the number of years an employee was there, the jobs they were skilled to do, and the efficiency at which they performed them. Cooperation with management meant the ability of the employee to get along with upper management as well as the crew leaders, and their taking direction when asked. The flexibility category meant the willingness to help in other departments, without complaint. Overtime availability was whether when asked to work overtime the employee did so without complaint. Zankl testified overtime was voluntary and no records were kept at that time as to whether an employee was offered and/or accepted overtime. The safety and company rules category was whether an employee had to be reminded concerning any safety issues, such as wearing safety glasses and work boots, and whether they were doing things in an unsafe manner that could cause injury. Zankl testified it was also about rules in general and

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following the discussion of the category definitions they went from the top of the list employees, and called out the individual's name and rated the employee for attendance based on the attendance list. Zankl testified then the employee's supervisor gave his input for each category for the named employee for the rating on the tally sheet, and if someone had a discrepancy it would be discussed amongst the group. Zankl testified she did not evaluate the plant employees during the meeting.

Matthews testified as follows: Matthews attended the 5 p.m. December 6, meeting which he testified lasted 5 to 5 and ½ hours. At the outset of the meeting, McAlear spoke about the need for a general reduction in the work force for economic reasons. Each person in attendance was given a form listing the nine categories and time to look at it. Contrary to Zankl, Matthews testified there was no discussion about what the nine rating categories meant during the 5 p.m. meeting.[40] There was only one tally sheet. They then started from the top of the list and rated an employee on all of the categories and then proceeded to the next employee. The members of the group recognized who they knew and who they worked with in determining who they gave input on. Matthews testified he made no preparations for his participation in the meeting, except his involvement in preparing the evaluation sheet.

Stapleton testified he learned he would be part of the committee to evaluate employees for the reduction in force around 3 p.m. on December 6, which was his quitting time that day. Matthews told him they were going to evaluate every employee for a 10 percent reduction in force. Until that time, Stapleton had no idea the meeting was coming. Stapleton made up the tally sheet for the meeting after the nine categories were given to him. Matthews told him to prepare the sheet. Stapleton used a document that already listed the employees by seniority and then he added the categories to the sheet. The meeting began at 5 p.m. Stapleton testified there was no discussion at the meeting about what the categories meant and that he was never given any definitions for the categories. Thus, although Matthews and Stapleton testified the ratings of the plant employees during the meeting were largely based on just their opinions, and Zankl and Matthews claimed substantial effort was made to define the ratings categories, Stapleton's testimony reveals they never bothered to provide him with these alleged definitions. Stapleton estimated that each discussion was around 5 to 10 minutes per each rating category for each employee and that the meeting took 6 hours. However, Respondent's records reveal about 82 employees were rated during the meeting with nine 9 categories each. Using Stapleton's lower estimate of 5 minutes per category for each employee, the meeting would have taken 61 hours and 30 minutes. McAlear, Zankl, Matthews, and Stapleton denied that anything was mentioned about an employee's union activity being part of the criteria.

Zankl testified that December 7, 2001, was chosen as the layoff date because they knew they had to take immediate action because they were not going to continue on a downward slide. Zankl testified the December 6, meeting ended at 10:30 p.m., and the layoffs began to be effectuated the following morning. Zankl testified they were able to service the customer after

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that there were probably thousands of different rules in the handbook. Zankl testified she did not consider this as being the same as the disciplinary category, and that she did not think there was an overlap between the two categories. The teamwork category meant how employees got along with co-workers and the crew leaders. Zankl testified an employees inability to get a long with fellow workers would not necessarily be noted in their files as employees complain about each other all of the time. Attitude meant the perception of the employee's attitude toward the company, and wanting to work at the company.

[40] Matthews testified that there was a discussion of what the categories meant during the earlier meeting on December 6, when the list of the categories was formulated.

the layoffs because the remaining employees worked over time at time and one half. Zankl testified it was decided the remaining employees would work significant amounts of overtime as the workload increased. Zankl testified that as additional attrition came or the workload increased, they also brought in temporary employees. Zankl testified the employees were terminated on December 7, 2001, as opposed to being laid off, because Respondent wanted to take a team into the future, and they determined these people did not fit the team.

Zankl testified she was involved in the planning for use of temporary employees after the reduction in force. Beginning late January 2002, Respondent began to use temporary employees. Zankl testified that temporary employees were not used to replace the eight workers terminated as a result of the December 7, force reduction. Rather, they were used to replace the nine or so employees whose employment ended or who were on lengthy leave after the December 7, 2001, force reduction. The temporary employees hourly rate was $9 an hour, plus a 40% fee to the temporary agency. Respondent did not pay any benefits for these employees, nor was respondent paying payroll taxes. Zankl testified the decision to use temporary employees was probably first made in January 2002, when they needed the first person. Zankl testified that some of the temporary employees worked for extended periods of time and were still working for Respondent at the time of the hearing. Zankl testified she did not recall making any calculations before the December 7, 2001, permanent reduction in force on how the direct labor cost would be impacted by using increased overtime or with the use of temporary employees.

McAlear testified they discussed the use of temporary employees and overtime toward the end of November as part of their group discussions. However, McAlear disavowed the claim that, prior to the reduction in force there was a “strategic plan” for the use of temporary employees and overtime, stating it was Respondent’s counsel’s term at the hearing and an overstatement. McAlear testified the actual decision was made in 2002 to use temporaries instead of maintaining Respondent’s current work force, after Respondent started losing additional employees in December 2001.

Respondent’s payroll records reveal that its overtime hours increased for its regular hourly workforce from 17.42 in November 2001, to 633.84 hours in December 2001. Respondent’s overtime hours for its regular work force increased from 1505.3 in 2001 to 11846.25 hours in 2002. Respondent used no temporary employees in 2001. It began using temporary employees in January 2002, and used them throughout the year for both regular and overtime hours with 12045.90 regular hours and 1758.5 overtime hours.

I find that Respondent has failed to rebut the General Counsel’s prima facie case that the December 7, 2001, layoffs were motivated by its anti union animus toward the majority of employees selected for layoff. In this regard, Respondent’s officials knew about Respondent’s economic difficulties by early October 2001, and on October 12, McAlear announced during a meeting with all employees in attendance that if there were a layoff it would be by seniority. Respondent’s officials also admitted that a permanent layoff was not being considered at that time. On December 5, 2001, crew leader Gillespie interrogated Durco and Reens about their union activity and Griffin and Anderson’s names were mentioned in response to Gillespie’s questioning. On the morning of December 6, without prior warning McAlear hurriedly met with Zankl, Matthews and Radabaugh to develope a nine category criteria for permanently laying off 10 employees. Matthews, Respondent’s vice-president of operations, who was in charge of the vast majority of employees being considered for layoff, testified that he was not consulted before hand about the need for a layoff or how it would impact on production. Thus, although during the course of the hearing, Respondent’s officials prided themselves on speed of service to their customers, in their haste to nip a new union drive in the bud, they failed to gauge the

impact on customer service this sudden termination of a large number of production employees would have. Along these lines, following the layoff Respondent greatly increased its overtime hours and began to use temporary employees. Yet, McAlear and Zankl testified Respondent had no plan in place for these alternatives prior to the layoff, and Zankl had conducted no studies to determine the impact on labor costs of using temporary employees and overtime prior to the layoff.

Matthews also testified that while he was in attendance for the meeting in which the nine criteria were developed for selecting employees to be laid off, he had little input formulating the criteria selection process, although most of the employees selected for layoff were under Matthews' supervision. Moreover, while Zankl and Matthews testified in detail about the formulation of definitions for each of the nine criteria layoff, Matthews testified and Stapleton confirmed that those definitions were never reviewed with the reduction in force committee. Thus, Stapleton, whose input was second to that of Matthews in terms of deciding which plant employees were to be selected for layoff was never told of these alleged definitions. Creating an air that Respondent's officials were inventing what occurred as then went along in their testimony, and laying doubt that definitions for the layoff criteria were ever formulated as Zankl and Matthews testified.[41] In other words, there was no reason for McAlear, Zankl, and Matthews to formulate in detailed definitions for the criteria without thereafter ensuring that those definitions were disclosed to the committee before the layoff selections were made. The pretextual nature of Respondent's actions were further demonstrated by the inconsistent testimony of McAlear, Zankl, and Matthews as to whether the use of employee personnel files was ever discussed as Respondent's officials developed the layoff procedure.

In sum, the testimony of Respondent's witnesses revealed that Respondent was in such a hurry to terminate the employment of its leading union adherents that supervisors, without prior warning, met from 5 p.m. to 10 p.m. on December 6, to determine who should be laid off amongst 82 employees, with little or no preparation prior to the meeting. Personnel files of those in the potential layoff pool were not consulted, with no explanation why, and while Matthews and Zankl testified they took substantial time to define each of the layoff rating criteria they failed to convey those definitions to the layoff committee. Matthews, the operations manager, was not consulted about the need for a layoff, or about the impact of a sudden layoff of this magnitude would have on Respondent's operations. Nor were any detailed plans made prior to the layoff as to how Respondent would continue to maintain production or the relative costs of doing so. Finally, Respondent failed to provide any justification for the timing of the layoff, or evidence of a change in its economic situation from October 12, 2001, when a temporary layoff by seniority was announced to its staff as sufficient, if a layoff was necessary at all. Accordingly, I find the reasons advanced for the December 7, 2001, layoff of the seven alleged discriminatees were pretextual, and given the haste in which it was executed, the permanent layoff was motivated by employees' union activity in violation of Section 8(a)(1) and (3) of the Act. See *Alliance Rubber,* 286 NLRB 645, 647 (1987); *Hunter Douglas, Inc.,* 277 NLRB 1179, 1180 (1985), and *Birch Run Welding & Fabricating v. NLRB,* 716 F.2d 1175, 1180 (6th Cir. 1985).

[41] Respondent's officials testified that the evaluation meeting began at 5 p.m. and ended at around 10:30 p.m. on December 6. Respondent's records reveal that a combination of 82 plant and office employees were rated with nine categories per employee totaling 738 ratings. Assuming the meeting lasted 6 hours, with no breaks, that would allow less than 30 seconds for discussion for each rating. Yet, Stapleton incredulously claimed Respondent's officials spent 5 to 10 minutes discussing each category for each employee further revealing the pretextual nature of Respondent's claims.

Since I have concluded Respondent's decision to institute a permanent layoff on December 7, 2001, which included Anderson and Holl was unlawfully motivated, I have concluded that Anderson and Holl, who unlike the other discriminatees have not settled their claims, were discharged on December 7, 2001, in violation of Section 8(a)(1) and (3) of the Act.

2. The layoff selection process

Should the Board disagree with my conclusion that permanent layoff was unlawful; I shall also review Respondent's selection process for the layoff, in particular as it related to Anderson and Holl.[42] I have concluded that the nine criteria used in the layoff selection process were subjective, and repetitive and created and applied in a manner designed to target union adherents. Respondent officials' description of the formulation and application of its layoff criteria reveals the pretextual nature of its purpose. First, Both Zankl and Matthews testified that on December 6, 2001, they were part of a preliminary committee that composed detailed definitions of each layoff criteria. Yet, Matthews and Stapleton testified these definitions were never related to the termination selection committee raising the inference that in fact no definitions were created, except for trial as a cover for Respondent's expedited removal of its leading union adherents. Second, Stapleton testified that 5 to 10 minutes of discussion was applied for each category for each employee evaluated, and that meeting ended in 6 hours. However, as set forth above, even if there were only five minutes of discussion for each category per each employee, the meeting would have taken over 60 hours leading to the conclusion that very little if any serious discussion occurred. Third, while McAlear testified that there was a discussion among Respondent's officials and a decision that personnel files were not going to be used in the December 6, 2001, evaluation of employees; McAlear, Zankl, and Matthews eventually admitted that the use of personnel files was never discussed. Finally, Respondent's nine layoff criteria overlapped, and Matthews and Stapleton's testimony reveals that they repeatedly applied the same assertions to down grade the alleged discriminatees in multiple categories.[43]

Respondent's selection criteria were attendance, discipline, job skills, cooperation with management, overtime availability, safety and plant rules, teamwork, and attitude. Each employee was given a 1 to 10 rating for each category with 10 being the highest score. The ratings were totaled and the 10 individuals with the lowest scores were discharged. Seniority and quality of work were not used as criteria although in October 2001, the employees had been

[42] As set forth above, I have concluded that Respondent was aware of Anderson and Holl's pro union status at the time of its December 6, 2001, evaluation of those employees, and Respondent harbored animus toward its employees' union activities. Under the Board's *Wright Line* analysis, the burden shifts to Respondent to demonstrate it would have rated them in the same way absent their union activities. I have concluded Respondent has failed to meet that burden.

[43] I do not find Respondent's reliance in its brief on cases such as *Chapman v. AI Transport,* 229 F.3d 1012 (11th Cir. 2000), an age discrimination case, persuasive here. The court in *Chapman* stated concerning employer defenses that, "A subjective reason is a legally sufficient, legitimate, nondiscriminatory reason if the defendant articulates a clear and reasonably specific factual basis upon which it based it subjective opinion." Here I have concluded Respondent's selection criteria, many of which were subjective in nature, were created as a result of anti union animus, and applied in such a fashion to accomplish Respondent's object of ridding itself of certain key union supporters to squelch a second attempt at union organization at its facility.

assured that any layoff would be done by seniority, and work quality was an item on employees' prior evaluations.

a. Anderson

Anderson worked for Respondent from January 3, 1992, to December 7, 2001. At the time of his discharge, Anderson was the crew leader for the roll forming department. During his first year of employment, Anderson worked in the auto department where he ran springs out of wire on automatic machines. Anderson also worked in the shipping department for a year and a half where he cooked springs in ovens, put ends on springs, and palletized springs.

In Respondent's December 6, 2001, rating process, Anderson's job skill rating was two. Matthews testified as follows: Anderson was ineffective as a crew leader, which was apparent by his inability to motivate people. Matthews told Anderson he had to make sure his crew was on the job at the start of the shift, and that they remain busy during the shift, and that when he was low on work to let Matthews know so the crew could be reassigned. Matthews testified if they had eight jobs it took them a day, and if they had three jobs they would expand their work to also take a day. Anderson had the authority to reassign employees in roll forming when they were not busy to other areas, or Matthews or Stapleton could direct him to do it. However, Anderson did not reassign his crew without direction, and he did not come to management when they lacked work. Matthews talked to Anderson about this and about his inability to motivate people. Matthews testified Anderson also had limited abilities outside of the roll forming area. Stapleton testified Anderson lacked organizational and motivational skills and that Stapleton talked to Anderson about these deficiencies possibly more than 10 times by way of undocumented coaching and counseling. Stapleton testified that as far as he knew, Anderson's skills were limited to the job he was doing.

Anderson received a five in attitude. Matthews testified Respondent started to make a lot of changes around September 2000, which infringed a little on Anderson's area in roll forming, and Anderson did not want to give up any square footage. Anderson did not like decisions that were made, would resist with his head hanging and a scowl on his face. Stapleton testified that Anderson received a five in attitude because he was argumentative, and occasionally he complained that this was not right or "this sucks".

Anderson received a three in flexibility. Matthews testified Anderson this rating because of his resistance to change. Matthews testified there was an overlap among the categories. Stapleton testified when things were slow, they would ask Anderson to use his people in other areas of the plant, and he would always argue about it.

Anderson received a three in teamwork. Matthews testified there was a lot of friction between Anderson and the other crew leaders relating to Anderson protecting his turf and not wanting his area to be used for temporary storage of springs. There were frequent times Anderson had run ins with receiving crew leader Dave Carpenter over this issue. Stapleton testified Anderson's teamwork rating was based on being able to use his people in other areas, and the continuous battle between Anderson and receiving crew leader Carpenter about plant space.

Anderson received a three rating for cooperation with management. Matthews testified Anderson was the least cooperative of any crew leader, stating he would often argue and debate issues when given direction. Stapleton testified Anderson was a turf protector, and would argue about every change that affected his area, including going over Stapleton's head to try and stop the changes. Stapleton testified if anything from receiving department was placed

into roll forming there was an argument about it. Anderson's propensity to argue was brought up at a crew leaders meeting, and Stapleton talked to him about it after that.

Anderson received a three in safety. Matthews testified that on more than one occasion Anderson allowed his crew to work in an unsafe manner, including failure to ensure they wore the proper safety equipment such as safety glasses. On one occasion in 2001, Matthews observed Anderson's crewmember Marlon Wharton placing his hands inside of a roll forming machine while it was running in order to clean it. Matthews testified the machine could have smashed Wharton's hands. Matthews did not write Anderson or Wharton up for the incident. He testified he expected Anderson, as a crew leader, to have recognized the danger. Stapleton testified he had only had limited input in this rating, if any. Stapleton testified it was probably about the use of safety glasses.

Anderson's personnel file contains an evaluation form dated July 12, 2001. Stapleton rated Anderson on the evaluation, which was approved by Matthews. Both Stapleton and Matthews signed the evaluation. The evaluation contains five ratings categories with five being exceptional, four is acceptable, three is improving, two is needs improvement, and one is unacceptable. Anderson received a five rating in dependability, with the comment, "I need to spend very little time in the roll forming area. I can count on Tim to complete daily responsibilities with little to no supervision." Anderson received a four rating in quality accuracy with the comment mistakes coming out of roll forming are rare; a four rating in attendance and housekeeping. Anderson received three rating in drive, where it was stated, "Tim's department runs well. I think during slow times, Tim can better utilize time and personnel." He received a three rating in courtesy/cooperation where it is stated, "This is an area where Tim is improving. He has had a few altercations with Dave Carpenter, but overall he gets along with everyone." Anderson received a three rating in input/acceptance where it is stated, "With new management comes changes. Tim has had difficulties relating to the changes effecting his department." It is stated in the evaluation for areas that need improvement that, "Technology and growth are affecting the plant where space and organization are critical. Tim needs to focus some attention on how to efficiently change with the times. His attitude definitely affects his subordinates. Instead of fighting change, implement it in ways to improve as a plant overall." However, under general comments, it is stated that, "Tim's efforts are paying off in the department. Errors are minimal and all work is done with high quality in a timely fashion. His area needs little supervision and his guys are well trained to keep the department running smoothly in his absence."

Anderson credibly testified while he was crew leader in roll forming no one from management told him he was failing to motivate people in his area or that he was not getting the work done. Anderson testified that no one told him that he was failing to enforce safety rules for his crew. Anderson denied arguing with Stapleton when Stapleton told him to reassign his employees. Anderson denied permitting Wharton to clean a machine while it was running. Anderson testified that, as a crew leader, he did have some concerns about Stapleton taking away plant space from the roll forming which was a production area and allowing crew leader Dave Carpenter to use it for storage. Anderson testified that he did have a few conversations with Carpenter about it, and he admitted arguing with Carpenter about it although he claimed in a joking fashion. Anderson admitted to also having discussions with Stapleton about the situation.

I find Respondent's rating system as applied to Anderson was skewed. Anderson's credited testimony reflects that during the early years of his employment at Respondent he worked in two other departments besides roll forming, the auto department and shipping, for substantial periods of time. There is no evidence that in their haste to shove Anderson out the

door that Respondent's officials Matthews or Stapleton attempted to learn this information before they gave him a 2 out of 10 rating in the area of job skills. Moreover, aside from his crew chief responsibilities, Anderson was able to operate both machines in Respondent's roll forming department, which was a production department. I also find Matthews and Stapleton's claims about the lack of productivity of Stapleton's crew to be exaggerated, and undercut by their own prior evaluation of Anderson, wherein Stapleton stated, "I need to spend very little time in the roll forming area. I can count on Tim to complete daily responsibilities with little to no supervision;" and "Tim's efforts are paying off in the department. Errors are minimal and all work is done with high quality in a timely fashion. His area needs little supervision and his guys are well trained to keep the department running smoothly in his absence." Anderson received low ratings in attitude, flexibility, teamwork, and cooperating with management. However, Matthews testified that the categories tended to overlap, and Anderson received a low rating in these areas according to Matthews and Stapleton due to a resistance to change, arguing about the use of roll forming as a storage area for other departments, arguing about using his employees in other departments when things were slow. However, in his July 12, 2001, evaluation under the category "Drive," Stapleton stated Anderson's department runs well, but during slow times, Anderson could better use time and personnel. Anderson was given a three rating under "Drive" indicating he was "Improving" in this area. Similarly, under "Cooperation," Anderson was given a three out of five rating in his July 12, 2001, evaluation stating that although he had a few altercations with Carpenter, "overall he gets along with everyone." While it was noted in the evaluation that Anderson needed to improve concerning his resistance to change, overall his evaluation was very positive.

Thus, while Anderson did have some problems adjusting to some of the changes Matthews and Stapleton were making in the plant, he was never disciplined for this conduct, although Respondent had a progressive disciplinary procedure in its employee handbook. Moreover, he did not receive less than a three of five in any category in his July 12, 2001, evaluation, which ended in a very positive note about the way Anderson's department was being run. I find Matthews and Stapleton's claims about Anderson's poor performance to be exaggerated and repetitive in nature, as they relied on basically the same assertions to down grade Anderson in multiple criteria in Respondent's December 6, evaluation process.

Similarly, in the area of safety, I do not credit Matthews' claims that on more than one occasion Anderson allowed his crew members to work in an unsafe manner, including failure to ensure they wore the proper safety equipment such safety glasses. Matthews also testified he observed Anderson's crew member Wharton placing his hands inside of a roll forming machine while it was running in order to clean it. However, Anderson credibly denied this incident, and Matthews did not write Anderson or Wharton up for it. Moreover, there is no contention in Anderson's July 12, evaluation that he permitted his crew to work in an unsafe fashion. Rather, the evaluation contains comments that Anderson's department "runs well," and that Anderson could be counted on to "complete daily responsibilities with little to no supervision." I therefore find that Matthews and Stapleton exaggerated the problems with Anderson's performance in order to foster his termination because of their belief that Anderson was cooperating with union supporters.

b. Holl

Holl worked for Respondent from May 5, 1995, to December 7, 2001. At the time of his termination, Holl was a first shift mandrel operator. Holl had worked as a mandrel operator for 5 or 6 years. Holl had performed other jobs at Respondent, including working in shipping and receiving when he was first hired for about 8 months. Holl testified he never declined overtime

and that he never refused to perform any job that was assigned to him. Holl received the following ratings in Respondent's December 6, 2001, layoff evaluation:

Holl received a five in discipline. Matthews testified Holl would leave his workstation with some frequency. Matthews instructed Stapleton to talk to Holl, and he thought Stapleton may have disciplined him for walking off the job in 2001. Stapleton testified while Holl was working on the second shift, Holl had run ins with then second shift supervisor Vincent. Stapleton thought it was excessive and Stapleton worked on second shift for a period of time to try and observe what was happening. Stapleton testified he tried to counsel Vincent, who was a salaried supervisor, to take care of the situation.

Holl received a five in job skills. Matthews testified Holl was a mandrel operator who was only trained in two areas mandrels and shipping. Respondent has six mandrel machines plus the batch machine in the mandrel department. Matthews testified Holl made it clear that he only wanted to be assigned to run mandrel number five. Matthews testified Holl's output as a mandrel operator was not what it should be and it was erratic. Holl was only assigned to shipping on rare occasions because he was not effective there. Stapleton testified Holl worked in the mandrel department, but could only run mandrels five and six.

Holl received a two in cooperation with management. Mathews testified this related to his resistance to running other mandrels beside mandrel five, although he was trained on the other machines. Matthews testified Holl was also unable to follow directions to stay on the job. Holl would go to other machines and bother other workers and would wander into the restroom. Stapleton testified Holl received this rating in this category because Vincent told Stapleton that Holl intimidated him. Stapleton testified he tried to counsel and coach Vincent on how to handle the situation.

Holl received a five in flexibility. Matthews testified Holl would work on assignments other than mandrel five only under duress. Stapleton testified Holl received his flexibility rating because he could only work two machines. Stapleton testified it was not that he would not work others mandrels, it was that his job skills prevented him from doing so.

Holl received a four in teamwork. Matthews testified this was because Holl was only trained in shipping and the mandrel area, and he lacked efficiency in the shipping, and if assigned there someone else had to pick up his work. Matthews also testified Holl preferred to work alone and not as a team. Stapleton testified Holl's teamwork rating was due to the arguments with Vincent and Holl was borderline insubordinate in almost refusing certain assignments. This was one of the reasons Holl moved to first shift, which occurred shortly before Holl's termination.

Holl received a three in attitude. Matthews testified Holl had difficulty taking direction from Vincent. Matthews testified that Holl also had difficulties with crew leader Gillespie when Holl transferred to day shift. The problems he had were in cooperating, staying on the job, and doing what he was supposed to do. Stapleton testified Holl received a three in attitude because when asked to do things he gave his supervisor a hard time all the time.

Holl received a five in over time availability. Matthews and Stapleton testified Holl did not work overtime every time it was offered. Holl received a seven in safety and plant rules. Matthews testified Holl would wander away from his machine and talk to other mandrel operators while they were working which created a safety issue. Matthews testified second shift

supervisor Vincent and crew leader Gillespie counseled Holl for this activity. Matthews testified Holl was written up for wandering off the job and going to the restroom.[44] However, Stapleton testified he was sure Holl followed most of the rules and he did not know why he was rated a seven.

Holl received perfect ratings on his evaluation dated February 9, 2001, signed by Vincent and Matthews. It states therein that, "Jim is willing to work on anything I give him to do without complaints." It also states he does "a very good job on man 5 & 6, and he hits his numbers almost every night." It states, "Jim works well with every one on the shift," and that he "always keeps busy and works from buzzer to buzzer."

Holl's file contains another evaluation dated August 11, 2001, which was signed by Vincent and Stapleton. Holl signed off on the evaluation on September 26, 2001. The evaluation states Holl always ran a good quality product. However, it state Holl had some problems with output in the last few months but was showing a lot of improvement. It states Holl has a tendency to stop working at times, but is starting to improve, and Holl was improving in accepting new changes. Holl received a five out of five rating in quality and housekeeping, a four out of five rating in attendance and cooperation, and a three out of five rating in drive, acceptance, and dependability. The evaluation states under general comments that Holl "needs to keep his numbers up and run steady through the shift. He runs a good product."

Holl testified that no one from management or supervision ever told him he had a problem wandering away from his workstation, that Stapleton never talked to him or warned him about walking off the job, and that no one ever told him he had a problem with his job skills. Holl testified that no one ever told him that he was reluctant to operate any machine but mandrel number five. He testified that he had in fact operated all six mandrel machines in the department, as well as the extension bench.

I find that Matthews and Stapleton's testimony about Holl in terms of their layoff evaluation process was exaggerated and somewhat contradictory. For example, Holl received a five in job skills. Matthews testified Respondent has six mandrel machines plus the batch machine in the mandrel department but Holl made it clear that he only wanted to be assigned to run mandrel number five, although he was trained on the other machines. Contrary to Matthews, Stapleton testified Holl could only run mandrels five and six and that his skills prevented him from running other machines. However, in Holl's February 9, 2001, evaluation, Vincent states, "Holl is willing to work on anything I give him to do without complaints." I have, considering the witnesses' demeanor, credited Holl's testimony that he operated all six mandrel machines and the extension bench in the mandrel department without complaint.

Concerning Holl's ratings of two, five, four, and three respectively in the categories cooperation with management, flexibility, teamwork, and attitude, Matthews and Stapleton continued to repeat the same complaints about Holl's performance to justify these low ratings. That is Holl's willingness to only operate Mandrel five, an assertion that I have discredited, Holl's alleged inability to take direction from Vincent and then later Gillespie, and an inability to stay on the job. Concerning these allegations, Vincent stated in Holl's February 9, 2001, evaluation that Holl, "works very well with everyone on the shift," that Holl "is willing to work on anything I give him to do without complaints," and that Holl works buzzer to buzzer. In Holl's evaluation dated August 11, 2001, where Vincent rated Holl, and which Stapleton approved, there are no

[44] I have found the referenced warning to have been issued in violation of Section 8(a)(1) and (3) of the Act.

remarks that Holl had a problem with supervision. Rather, it is stated under the category courtesy/cooperation that Holl "gets along well with his peers." The evaluation states Holl always runs a good quality product, that his output was improving in the last few months, as was his willingness to accept changes.

Thus, I have concluded that Holl was a long term employee, who, as one point during the course of his employment, had some problems with his supervisor and productivity. However, as set forth in his evaluation he produced quality work and his output was improving. I have also concluded that Respondent's officials exaggerated certain claims about Holl's performance in order to down grade his score. Matthews and Stapleton testified Holl did not work overtime every time it was offered, and therefore he only received a five in this category. Here again there is an arbitrariness about this rating, as Respondent kept no records of the number of times over time was offered to an employee, and the amount it was accepted. I have credited Holl's testimony over that of Matthews and Stapleton who were rating 64 employees over a relatively brief period of time with little or no preparation, and have concluded as Holl testified that he never declined overtime, and he never refused to perform any job when it was assigned to him. I have concluded that Respondent has failed to establish it would have rated Holl as low as it did on December 6, 2001, absent his union activity.

Accordingly, since I have concluded that the December 7, 2001, permanent layoff was implemented in response to and because of employees union activity, and that the manner in which Respondent rated employees for the layoff was pretextual and used as a vehicle to target union adherents, I find that Respondent terminated Anderson and Holl on December 7, 2001, in violation of Section 8(a)(1) and (3) of the Act.[45]

CONCLUSIONS OF LAW

1. Respondent violated Section 8(a)(1) of the Act:

(a) By maintaining in its employee handbook an overly broad no solicitation rule, which limits solicitation to such things as Girl Scout cookies or school fund raising, requires employees to solicit in non work areas and to have prior authorization before engaging in solicitation from the Human Resource Department or plant management.

(b) By maintaining in its employee handbook an overly broad no solicitation rule, providing that Personal business may not be conducted during working hours.

(c) By on September 26, 2001, creating the impression that an employee's union activity was under surveillance.

(d) By on September 26, 2001, promulgating an overly broad no solicitation rule by informing an employee that he should not discuss the union on company time.

(e) By on December 5, 2001, coercively interrogating employees about their union activities.

2. Respondent violated Section 8(a)(1) and (3) of the Act:

(a) By placing a verbal warning dated September 7, 2001, in employee James Holl's file.

(b) By on or about December 7, 2001, permanently laying off its employees James Holl and Tim Anderson because of their union activities and in order to discourage other employees from engaging in union activities.

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[45] Respondent tendered into evidence a complaint filed on behalf of Anderson, Durco, Ramirez, Reens, Short, and Griffin in the "Court of Common Pleas, Wood County, Ohio," raising a variety of claims relating to the termination of these employees. (R. Exh. 4). Respondent did not raise any arguments about this exhibit in its brief. Moreover, the Board has held that findings in state proceedings are admissible but not controlling in Board determinations. See *Cardiovascular Consultants of Nevada, MI,* 323 NLRB 67, 67, fn. 2 (1997).

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. The Respondent having discriminatorily permanently laid off employees James Holl and Tim Anderson, it must offer them reinstatement to their former positions, or if those positions no longer exist to substantially equivalent positions and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of their termination to the date of a proper offer of reinstatement, less any net interim earnings, as prescribed in *F.W. Woolworth Co.,* 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[46]

ORDER

The Respondent, Service Spring Corporation, of Millbury, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining in its employee handbook an overly broad no solicitation rule, which limits solicitation to such things as Girl Scout cookies or school fund raising, requires employees to solicit in non work areas and to have prior authorization to solicit from the Human Resource Department or plant management.

(b) Maintaining in its employee handbook an overly broad no solicitation rule, providing that, Personal business may not be conducted during working hours.

(c) Creating the impression that employees' union activity is under surveillance.

(d) Promulgating an overly broad no solicitation rule by informing employees that they should not discuss the union on company time.

(e) Coercively interrogating employees about their union activities and the union activities of other employees.

(f) Placing verbal warnings in employees' files because they engage in union activity.

(g) Permanently laying off employees because of their union activities and in order to discourage other employees from engaging in union activities.

(h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, delete from employee manuals which are distributed to new employees the rule that limits solicitation to such things as Girl Scout cookies or school fund raising, requires employees to solicit in non work areas and to have prior authorization to engage in solicitation from the Human Resource Department or plant management, and either distribute to current employees copies of the manual with these deletions, or make such deletions in the copies which they now possess.

(b) Within 14 days from the date of this Order, delete from employee manuals which are distributed to new employees the rule that provides that, "Personal business may not be

[46] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

conducted during working hours," and either distribute to current employees copies of the manual with this deletion, or make such deletion in the copies which they now possess.

(c) Within 14 days from the date of this Order, offer employees John Holl and Tim Anderson full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, discharging any employees, if necessary.

(d) Make John Holl and Tim Anderson whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this decision.

(e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful termination and warning to John Holl, and the unlawful termination of Tim Anderson, and within 3 days thereafter notify the employees in writing that this has been done and that the terminations and/or warning will not be used against them in any way.

(g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place to be designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at its facility in Millbury, Ohio, copies of the attached notice marked "Appendix."[47] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 7, 2001.

(i) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. April 29, 2004

Eric M. Fine
Administrative Law Judge

[47] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT maintain in our employee handbook an overly broad no solicitation rule, which limits solicitation to such things as Girl Scout cookies or school fund raising, requires employees to solicit in non work areas, and to have prior authorization from the Human Resource Department or plant management.

WE WILL NOT maintain in our employee handbook an overly broad no solicitation rule, providing that, Personal business may not be conducted during working hours.

WE WILL NOT create the impression that employees' union activities are under surveillance.

WE WILL NOT promulgate an overly broad no solicitation rule by informing employees that they should not discuss the union on company time.

WE WILL NOT coercively interrogate employees about their union activities.

WE WILL NOT place verbal warnings in employees' personnel files because they engage in union activity.

WE WILL NOT permanently lay off employees because of their union activities and in order to discourage other employees from engaging in union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, delete from employee manuals which are distributed to new employees the rule that limits solicitation to such things as Girl Scout cookies or school fund raising, requires employees to solicit in non work areas and to have prior authorization from the Human Resource Department or plant management, and WE WILL either distribute to current employees copies of the manual with this deletion, or make such deletion in the copies which they now possess.

WE WILL, within 14 days from the date of the Board's Order, delete from employee manuals which are distributed to new employees the rule that provides that, "Personal business may not be conducted during working hours," and either distribute to current employees copies of the manual with this deletion, or make such deletion in the copies which they now possess.

WE WILL, within 14 days from the date of the Board's Order, offer employees John Holl and Tim Anderson full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make John Holl and Tim Anderson whole for any loss of earnings and other benefits suffered as a result of their unlawful terminations in the manner set forth in Board's decision.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful termination and warning to John Holl, and the unlawful termination of Tim Anderson, and within 3 days thereafter notify these employees in writing that this has been done and that the terminations and/or warning will not be used against them in any way.

SERVICE SPRING CORPORATION
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

1240 East 9th Street, Federal Building, Room 1695, Cleveland, OH 44199-2086

(216) 522-3716, Hours: 8:15 a.m. to 4:45 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (216) 522-3723.